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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

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In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

June 12, 2012

10:05 AM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

(CC: Doc no. 87, 57) Possible Final Hearing RE: (I) Authorizing the Debtors to Continue in the Ordinary Course of Business (A) Servicing Governmental Association Loans and (B) Foreclosure Activities Related to Certain Real Estate Owned by Fannie Mae, Freddie Mac and Ginnie Mae; (II) Authorizing the Debtors to Pay Certain Prepetition Amounts Due to Critical Servicing Vendors and Foreclosure Professionals; (III) Granting Limited Stay Relief to Enable Borrowers to Assert Related Counter-Claims in Foreclosure and Eviction Proceedings; (IV) Authorizing the Debtors to Use Cash Collateral Under the Fannie Mae EAF Facility; and (V) Granting Related Relief.

(CC: Doc# 91, 46) Final Hearing RE: Motion (I) Authorizing the Debtors to Continue in the Ordinary course of Business (A) Servicing Non-Governmental Association Loans, and (B) Sale Activities Related to Certain Loans in Foreclosure and Real Estate Owned Property, and (III) Granting Limited Stay Relief to Enable Borrowers to Assert Related Counter-claims in Foreclosure and Eviction proceedings.

(CC: Doc# 82, 69, 16) Final Hearing RE: Motion Authorizing (1) Continued Use of Cash Management Services and Practices, (II) Continued use of Existing Bank Accounts, Checks, and Business Forms, (IV) Interim Waiver of The Investment and Deposit Requirements of Bankruptcy Code Section 345, (V) Debtors to honor Specified Outstanding Prepetition Payment Obligations, and (VI) Continuation of Intercompany Transactions, Including Intercompany Transactions with Future Debtors. Granting Administrative Expense Status to Intercompany Claims.

(CC: Doc# 92, 41) Final Hearing RE: Motion Authorizing Residential Capital, LLC To Enter Into A Shared Services Agreement With Ally Financial Inc. Nunc Pro Tunc To The Petition Date For The Continued Receipt And Provision Of Shared Services Necessary For The Operation Of The Debtors Businesses.

(CC: Doc# 181, 183) Hearing to consider the Debtors Motion for Supplemental Order (1) Authorizing the Debtors to Continue implementing Loss Mitigation Programs; (II) Approving Procedures for Compromise and Settlement of Certain Claims, Litigations and Causes of Action; (III) Granting Limited Stay Relief to Permit Foreclosure and Eviction Proceedings, Borrower Bankruptcy Cases, and Title Disputes to Proceed; and (IV) Authorizing and Directing the Debtors to Pay Securitization Trustee Fees and Expenses.

(CC: Doc# 93, 43) Final Hearing RE: Motion (I) Authorizing But Not Directing Debtors To (A) Pay And Honor Prepetition Wages, Compensation, Employee Expense And Employee Benefit Obligations; And (B) Maintain and Continue Employee Compensation And Benefit Programs; And (II) Directing Banks To Honor Prepetition Checks And Transfer Requests For Payment Of Prepetition Employee Obligations. (related document(s)43).

(CC: Doc# 94, 58) Final Hearing RE: Motion Authorizing the Debtors to File Under Seal confidential Exhibit to the Governmental Association Servicing Motion and (II) Limiting Notice Thereof.

(CC: Doc# 108) Final Hearing Re: Motion Authorizing Payment of Taxes and Regulatory Fees Under Bankruptcy Code Sections 105(a), 363, 506(a), 507(a)(8), 541 and 1129 and Bankruptcy Rule 6003.

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RESIDENTIAL CAPITAL, LLC, ET AL.
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THE COURT: All right, please be seated. We're here in Residential Capital, LLC, number 12-12020.

MR. NASHELSKY: Good morning, Your Honor. Darren Nashelsky from Morrison & Foerster, proposed counsel to Residential Capital and the other debtors before this Court. We have eight matters on for this morning, Your Honor: shared services, employee wages, taxes and regulatory fees, cash management, and four servicing-related motions.

Since the filing of these motions, the debtors have worked very closely with a number of constituencies to resolve issues. We've had numerous calls and meetings with the creditors' committee and its advisors, the Office of the United States Trustee, Ally Financial, the trustees under a number of our securitizations, Fannie Mae, Freddie Mac, Ginnie Mae, and other parties.

I'm pleased to report that we've resolved all but four objections to the motions on for today. Of those objections, two are omnibus objections where it is not entirely clear as to which motions they pertain, but where we could ascertain, we will respond. One is the U.S. Trustee's objection on the 345 issue. And the final one is from an association of consumer bankruptcy attorneys and individuals on the supplemental servicing.

There are a number of changes we made to the orders

RESIDENTIAL CAPITAL, LLC, ET AL.

12

1 filed with the initial motions, and we filed on the docket last
2 night the revised orders with the cumulative blackline. I have
3 binders for Your Honor and your clerks of the marked pages from
4 the original to the versions that we are submitting. And if
5 Your Honor would like, I could hand those up.

6 THE COURT: Why don't you do that now? Thank you.

7 MR. NASHELSKY: Thank you.

8 THE COURT: Thank you.

9 MR. NASHELSKY: From the ones that we filed last
10 night, Your Honor, there were some changes -- minor changes to
11 the GA servicing, the supplemental servicing, cash management,
12 and an amended exhibit on the sealing motion, all of which
13 we'll discuss in detail.

14 In response to the objections, the debtors filed a
15 reply on June 8th with affidavits or declarations from George
16 Crowley, the senior human resources director; Jim Whitlinger,
17 the CFO; Yvette Gilmore of Freddie Mac; and Joe Pensabene, the
18 chief servicing officer; and Sowite Bagrijian (ph.), who is an
19 in-house counsel. They're all in court today and available to
20 testify, if necessary, Your Honor. As we go through each
21 motion, we'll move the admissions of the various affidavits, if
22 Your Honor would like.

23 THE COURT: Okay.

24 MR. NASHELSKY: Also with me today are two of my
25 partners who will be handling a couple of the motions, Lorenzo

RESIDENTIAL CAPITAL, LLC, ET AL.

13

1 Marinuzzi and Norm Rosenbaum.

2 So unless Your Honor would like to do something
3 different, I would start with the first motion.

4 THE COURT: Let's do it.

5 MR. NASHELSKY: Thank you. Your Honor, the first
6 matter on the agenda is the debtors' motion requesting
7 authorization to pay outstanding pre-petition wages, reimburse
8 unpaid pre-petition business expenses, and continue certain
9 benefit programs. Through the motions, the debtors are not
10 seeking to pay any amounts that would exceed the statutory cap
11 of 11,725 without committee consent. All of the relief sought
12 complies with Section 503. There are no payments to insiders
13 that would violate 503(c). And finally, the debtors are not
14 seeking any relief with respect to assuming any contracts
15 between officers, directors of the debtors. And interim order
16 on the motion was entered by Judge Peck on May 16th, docket
17 number 93.

18 There was only one response filed to the motion, and
19 that was by the creditors' committee. And the two omnibus
20 objections I referred to earlier do not appear to address the
21 employee motion.

22 THE COURT: Right. And when I read the committee's
23 response, it indicated what -- you've worked out an agreement
24 with the committee?

25 MR. NASHELSKY: Yes. And then I will go through that.

RESIDENTIAL CAPITAL, LLC, ET AL.

14

1 THE COURT: Okay.

2 MR. NASHELSKY: I'm pleased to report that we have
3 resolved those committee's objection, and they were set forth
4 in the versions filed last night. And I'll briefly go through
5 those.

6 The four changes we agreed with the committee, Your
7 Honor, were: that to the extent any of the pre-petition
8 employee obligations would exceed the statutory cap, the
9 debtors have agreed not to make any such payment without prior
10 notice and consent of the creditors' committee.

11 Second, although the debtors' seek to continue their
12 discretionary variable pay plan and their annual incentive
13 plan, they have agreed with the committee not to make any
14 payments under those plans without first coming back to the
15 Court and requesting approval of any payments. We don't
16 envision --

17 THE COURT: Those payments wouldn't be due for some
18 time?

19 MR. NASHELSKY: Until -- exactly. The end of the year
20 or early next year.

21 And the debtors have also agreed with the committee to
22 provide them notice of any proposed changes, modifications or
23 additions to the compensation or benefit plans, which the
24 debtors do from time to time, and we will discuss and give the
25 committee notice.

RESIDENTIAL CAPITAL, LLC, ET AL.

15

1 And finally, the debtors have agreed to give the
2 committee ten days' business notice prior to providing an
3 employee that is eligible to receive either a tier 2 severance
4 benefit, which is six to twelve months, or a severance payment
5 in excess of 50,000 dollars, with a termination letter, which
6 would commit the debtor to provide that severance over time.

7 And the debtors have agreed to notify the committee if
8 aggregate severance in any month exceeds half a million, or if
9 more than forty employees are terminated in any month.

10 With those changes, Your Honor, the committee has
11 signed off on the form of order that was filed last night. And
12 unless Your Honor has specific questions, the debtors request
13 that this motion be approved.

14 THE COURT: Let me hear from the committee. Let me
15 hear from the committee first.

16 MR. MANNAL: Your Honor, Doug Mannal from Kramer Levin
17 on behalf of the committee. Your Honor, we worked closely with
18 the debtors to make these changes. And with these changes,
19 Your Honor, the committee has no objection to entry of the
20 order.

21 THE COURT: Thank you. Mr. Masumoto?

22 MR. MASUMOTO: Good morning, Your Honor. Brian
23 Masumoto for the Office of the United States Trustee. Your
24 Honor, we just ask the we see a copy of the order before it's
25 entered. And we would also like to have a copy of the notices

RESIDENTIAL CAPITAL, LLC, ET AL.

16

1 that are being provided to the committee with respect to those
2 changes.

3 THE COURT: All right. Mr. Nashelsky, any problem
4 with that?

5 MR. NASHELSKY: No, Your Honor. Absolutely no problem
6 with either of those requests. We will provide copies of the
7 order before we ask the Court to enter them. And we will
8 provide them the same notice as we provide to the committee.

9 THE COURT: All right. Does anybody else wish to be
10 heard with respect to the employee wage motion?

11 All right. Subject to the U.S. Trustee having an
12 opportunity to review the final order, that's granted. Thank
13 you very much.

14 MR. NASHELSKY: Thank you, Your Honor. The next item
15 on the agenda is the debtors' motion for a final order under
16 Sections 105(a) and 363(b) of the Bankruptcy Code, authorizing
17 the debtors to enter into a shared services agreement with its
18 nondebtor parent, Ally Financial, Inc. This agreement ensures
19 that ResCap continues to receive necessary services for the
20 continued operation of its business; and also the debtor
21 provides services. The debtors are seeking authority to enter
22 into this agreement nunc pro tunc to the petition date. An
23 interim order on this motion was entered by Judge Peck on May
24 16th, and it's docket number 92.

25 On June 8th the debtors filed with the court a

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RESIDENTIAL CAPITAL, LLC, ET AL.

17

1 supplemental affidavit of James Whitlinger in further support
2 which includes additional evidence in support of this motion.
3 Other than the omnibus objections to the first-day motions
4 filed by the two individuals, the debtors have not received any
5 objections to this motion.

6 As explained in more detail in Mr. Whitlinger's first-
7 day affidavit and the supplemental, this agreement was the
8 result of very extensive arm's-length negotiations between
9 ResCap and AFI over a number of months, including many meetings
10 with counsel and businesspeople, that resulted in the agreement
11 that is before the Court.

12 In the last few weeks, the debtors' advisors have
13 worked very closely with the committee, providing detailed
14 information, participating in numerous calls with the committee
15 and its advisors regarding among other things, the pricing of
16 the services, the significant negotiations that went into
17 development of the agreement, and the disruption and cost of
18 having to transition these services from AFI to a third party,
19 if this motion weren't approved.

20 THE COURT: As I understand it, you negotiated some
21 changes with the committee.

22 MR. NASHELSKY: Yes. And I will go through those,
23 Your Honor. There were three changes in the order requested by
24 the committee. They were with respect to notice and a
25 reservation of rights on claims arising from pre-petition

RESIDENTIAL CAPITAL, LLC, ET AL.

18

1 services.

2 The notice that we agreed to with the committee was
3 providing five days' advance notice to the committee of any
4 assignment of the agreement and any material amendment or
5 modification to the agreement. In addition, the debtors, the
6 committee, and any other party reserve any rights with respect
7 to pre-petition services between the debtors and Ally and any
8 claims that people may have arising from that.

9 Finally, Your Honor, as to the objections of Ms. Nora
10 and Mr. Papas, the omnibus objections I referred to, they
11 objected to shared services to the extent that it might
12 construe a preferential transfer to the parent or a release of
13 the parent's liabilities for the acts pre-petition or post-
14 petition with its subsidiaries.

15 We believe, with the change to paragraph 9 that we
16 agreed to with the creditors' committee, which reads,
17 "Notwithstanding anything herein, this order shall not waive or
18 foreclose and is without prejudice to any and all claims or
19 causes of action that may be made by the debtors or any party-
20 in-interest (including the committee) as a result of shared
21 services prior to the petition date." We believe that should
22 address those omnibus objections.

23 And unless Your Honor has any questions, we would ask
24 that that motion also be approved.

25 THE COURT: All right. Does the committee want to be

RESIDENTIAL CAPITAL, LLC, ET AL.

19

1 heard? Mr. Eckstein?

2 MR. ECKSTEIN: Your Honor, good morning. Kenneth
3 Eckstein of Kramer Levin, proposed counsel for the official
4 creditors' committee.

5 Your Honor, this was an important motion to the
6 committee, because it obviously reflected a significant
7 business transaction between ResCap and its parent, Ally,
8 immediately prior to the petition date. We actually spent a
9 significant amount of time, including with our financial
10 advisor, looking at the business aspects to satisfy ourselves
11 that, in fact, the proposed agreement was advantageous and not
12 detrimental. We were satisfied, as a business matter, that it
13 made sense for the debtor to proceed.

14 As Mr. Nashelsky read into the record, we negotiated a
15 very specific reservation of rights. As Your Honor is well
16 aware, the committee is in the process of undertaking an
17 investigation of pre-petition transactions and relationships
18 between the debtor and its parent. And we've made clear in
19 paragraph 9, as Mr. Nashelsky said, that all rights, claims,
20 potential causes of action, are reserved, notwithstanding this
21 order.

22 THE COURT: So if it should turn out later that the
23 rates or compensation being paid for shared services, if
24 someone is subsequently able to attack those, the committee has
25 reserved all of its rights to challenge those rates?

RESIDENTIAL CAPITAL, LLC, ET AL.

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1 MR. ECKSTEIN: I think, more specifically, Your Honor,
2 what we're reserving is that this order and this transaction
3 shall not in any way affect or be used adversely with respect
4 to any potential claims we might have.

5 THE COURT: All right. Thank you --

6 MR. ECKSTEIN: And we're satisfied on that basis, Your
7 Honor.

8 THE COURT: -- thank you, Mr. Eckstein.

9 Mr. Masumoto, do you want to be heard on this?

10 MR. MASUMOTO: Yes, Your Honor. Thank you.

11 MS. NORA: Wendy Alison Nora, from Minneapolis, Your
12 Honor.

13 THE COURT: Can you just -- can you please hold on,
14 please? I'll give you an opportunity to speak. But I want to
15 get the people in the courtroom first.

16 MS. NORA: Thank you, Your Honor.

17 THE COURT: Go ahead, Mr. Masumoto.

18 MR. MASUMOTO: Good morning, Your Honor. If I may, I
19 would like to ask for the same request that we did previously,
20 again, the ability to review the final order as submitted, and
21 that we get any notice that is provided to the committee.

22 THE COURT: Absolutely. And I think -- I assume
23 you'll be able to do that very promptly. So --

24 MR. MASUMOTO: Yes, Your Honor.

25 THE COURT: -- you ought to have an opportunity to

RESIDENTIAL CAPITAL, LLC, ET AL.

21

1 look at any of these final orders today. Because there were
2 changes made overnight, and I want to be sure that your office
3 has had an opportunity to see those.

4 MR. MASUMOTO: Thank you, Your Honor.

5 THE COURT: Thank you. All right, anybody else in the
6 courtroom wish to be heard?

7 All right, anyone on the telephone? Ms. Nora, did you
8 want to be heard?

9 MS. NORA: Yes, thank you, Your Honor. With respect
10 to the creditors' committee's agreements with the debtors, I
11 would simply like to review the proposed order and reserve all
12 of my rights to review that and to seek further relief, if
13 indeed, what I am concerned about is occurring, which is a
14 relationship between Ally and the debtors in which Ally is
15 using this bankruptcy to eliminate its liability for actions it
16 has taken. That's my concern.

17 Also preferential transfers will be addressed at the
18 hearing on June 18th, where I will appear personally.

19 THE COURT: Anybody else on the telephone wish to be
20 heard?

21 All right. With respect to the motion on shared
22 services, first, the Court has reviewed the Nora objection
23 carefully. To the extent it's not otherwise resolved, the
24 objection is overruled. The Court is satisfied, subject to
25 reviewing -- itself reviewing the final order, that the last --

RESIDENTIAL CAPITAL, LLC, ET AL.

22

1 certainly the last version of the proposed order that I saw
2 satisfactorily dealt with any issues raised by Ms. Nora. So
3 that objection is overruled. The order will be subject to the
4 review by the U.S. Trustee before it's entered.

5 Mr. Nashelsky, next motion.

6 MR. NASHELSKY: Thank you, Your Honor. The next
7 motion is the debtors' motion for payment of taxes and
8 regulatory fees. And I'm going to cede the podium to Mr.
9 Marinuzzi.

10 THE COURT: Thank you. Just bear with me for one
11 second, Mr. Marinuzzi.

12 MR. MARINUZZI: Sure, Your Honor.

13 THE COURT: Okay, go ahead.

14 MR. MARINUZZI: Good morning, Your Honor. For the
15 record, Lorenzo Marinuzzi, Morrison & Foerster. Your Honor, as
16 Mr. Nashelsky stated, the next item on the agenda is the
17 debtors' motion for authority to pay pre-petition taxes and
18 regulatory fees.

19 In the ordinary course of the debtors' business, the
20 debtors pay taxes and licensing fees in many jurisdictions.
21 The payment of these fees and taxes is necessary for the
22 debtors and their employees to continue to originate loans,
23 undertake collection efforts, and otherwise operate their
24 business.

25 At the time of the commencement of the bankruptcy

RESIDENTIAL CAPITAL, LLC, ET AL.

23

1 case, the debtors believed that they were substantially current
2 on the payment of pre-petition regulatory fees. The company
3 estimates currently that they will need to make direct payments
4 of pre-petition regulatory fees in the amount of approximately
5 200,000 dollars during the case. The debtors currently
6 estimate that the amount of pre-petition taxes that will come
7 due and payable during these Chapter 11 cases is approximately
8 1.1 million dollars. These estimates, which are current
9 estimates, are very close to the estimates contained in the
10 original motion.

11 THE COURT: What are your regulatory fees? Just give
12 me a sense.

13 MR. MARINUZZI: Regulatory fees are the fees for
14 licenses, for brokerage licenses, to maintain offices in
15 jurisdictions, to be a debt collector. In certain
16 jurisdictions you need a license, which costs money. Those are
17 examples --

18 THE COURT: Okay.

19 MR. MARINUZZI: -- Your Honor.

20 THE COURT: All right.

21 MR. MARINUZZI: Now, there's an aspect of this motion
22 that's a little unusual. And it relates to the fact that
23 ResCap employees who incur these fees or pay these fees use an
24 Ally Bank credit card. It's --

25 THE COURT: I've never heard of that before.

RESIDENTIAL CAPITAL, LLC, ET AL.

24

1 MR. MARINUZZI: Okay. Well, what we had sought in the
2 motion was the ability to pay or reimburse Ally for charges
3 incurred by Ally or the employee pre-petition, in particular,
4 ones that hadn't posted yet. We haven't seen any such charges
5 at this point. We don't believe that any pre-petition charges
6 will need to be paid on account of the credit card charges.
7 But we're going to reserve our right, under the order as
8 modified, to come back to court to the extent that these
9 charges arise and the debtors intend to seek to pay them.

10 During the hearing on the interim request back on May
11 15th, the U.S. Trustee expressed some concerns regarding
12 payments to Ally of amounts attributable to the pre-petition
13 period. So we agreed, as part of that hearing, that we were
14 going to carve out reimbursement to Ally for any pre-petition
15 charges and revisit them at the time of the final hearing. And
16 a day or so later, when the committee was formed, the committee
17 raised with us some concerns they had with respect to payments
18 to Ally --

19 THE COURT: I take it there's a tax-sharing agreement
20 that's --

21 MR. MARINUZZI: There is.

22 THE COURT: -- been in place for some time?

23 MR. MARINUZZI: There is a tax-sharing agreement
24 that's been in places, yes.

25 THE COURT: Is that being modified now?

RESIDENTIAL CAPITAL, LLC, ET AL.

25

1 MR. MARINUZZI: It is not being modified now, Your
2 Honor. But what we have agreed is that we will not be honoring
3 obligations under that pre-petition agreement to Ally, at this
4 point in time. And should the debtors determine to do so,
5 we'll consult with the committee, try to obtain their consent,
6 and if we're unsuccessful at doing that, we'll come back to the
7 Court.

8 THE COURT: So have the debtors been reporting losses?
9 Are there credits or deductions attributable to the debtors
10 that -- how are they being accounted for -- have they been
11 accounted for under the tax-sharing agreement?

12 MR. MARINUZZI: Let me back up, Your Honor. There are
13 a number of tax-sharing agreements. But the one in particular
14 that we are discussing now is the tax-sharing agreement that
15 relates to federal income taxes. And at one point --

16 THE COURT: Are there separate agreements with respect
17 to state taxes, or are they all covered under the master
18 agreement?

19 MR. MARINUZZI: They're separate agreements. And I
20 believe they are separate agreements, Your Honor. But it's
21 this tax-sharing agreement that is the one that is the lion's
22 share of the obligations.

23 The debtors, at one point, were a disregarded entity
24 for federal tax purposes. So they incurred, as I understand
25 it, no direct liability to the federal government for taxes.

RESIDENTIAL CAPITAL, LLC, ET AL.

26

1 At some point in time, the debtors elected to become a
2 corporate taxpayer, which gave rise to direct obligations for
3 federal income taxes.

4 Subsequent to that election, the company became,
5 again, a disregarded entity for tax purposes. And it was
6 something that, as we investigated further, looked at tax
7 returns, we realized something just didn't make sense. And as
8 we dug a little deeper, we realized that there was a subsequent
9 election to make them a disregarded entity for taxpaying
10 purposes. And with that assessment, in consultation with the
11 committee, it seemed to us that the liability that was a
12 concern to us for direct obligations to the federal government
13 for taxes, no longer existed.

14 Having said that, we're still assessing the impact of
15 the tax-sharing agreement on a whole host of issues, including
16 the transactions going forward.

17 THE COURT: When was the last election made?

18 MR. MARINUZZI: I understand it was around January of
19 2010.

20 THE COURT: Are tax years prior to that still open?

21 MR. MARINUZZI: I'll have to turn to -- no. I'm
22 advised, no. Okay?

23 So recognizing that this was no longer the same issue
24 we thought it was as of the petition date, as far as federal
25 tax liability, we've decided, in consultation with the

RESIDENTIAL CAPITAL, LLC, ET AL.

27

1 committee, that we weren't going to seek authority to make this
2 three and a half million dollar -- three million dollar pre-
3 petition payment that was coming due in June on account of our
4 obligations under the tax-sharing agreement. And that's
5 reflected in the order.

6 Now, the proposed final order, Your Honor, reflects
7 the collective attempts of the debtors, the committee, and Ally
8 to address these concerns. And I'm happy to walk through the
9 proposed order with the Court. But what the order does is it
10 clarifies that the debtors are not making payments to Ally on
11 account of pre-petition obligations, without the consent of the
12 committee or further order of the Court, as I already stated.

13 The debtors have also agreed to give the committee --
14 and we'll do the same for the U.S. Trustee's Office -- notice
15 of all payments of pre-petition taxes and regulatory fees in
16 excess of 1.25 million dollars, which is the estimate that we
17 believe is still accurate.

18 Unless Your Honor has any questions, I'll walk through
19 the changes in the order or I'll cede the podium to the U.S.
20 Trustee or the committee.

21 THE COURT: Let me hear from the committee next. Mr.
22 Mannal?

23 MR. MANNAL: Your Honor, Doug Mannal from Kramer
24 Levin, proposed counsel for the creditors' committee.

25 Your Honor, clearly this was a significant issue for

RESIDENTIAL CAPITAL, LLC, ET AL.

28

1 the creditors' committee. And we're focused on the payment of
2 amounts to Ally under the tax-sharing agreement. And with the
3 debtors' agreement that no such payments will be made, Your
4 Honor, the committee has no objection to the entry of this
5 order.

6 THE COURT: Thank you. Mr. Masumoto?

7 MR. MASUMOTO: Your Honor, based upon the agreement to
8 provide us copies of the final order and the notice, we have no
9 objections.

10 THE COURT: All right. Anybody else in the courtroom
11 wish to be heard with respect to the tax motion?

12 Does anybody on the telephone wish to be heard with
13 respect to the tax motion?

14 All right. The motion is granted, subject to review
15 of the final order.

16 MR. MARINUZZI: Thank you, Your Honor. Your Honor,
17 the next item on the agenda is the debtors' application for a
18 final order approving their cash management system and
19 requesting a waiver of Section 345(b).

20 As a servicer, the debtors are responsible for
21 managing and disbursing significant sums of money on a regular
22 basis, and often are required to make significant advances from
23 their own accounts to cover shortfalls in payments made by
24 borrowers, which include principal payments on their loans and
25 tax payments to local taxpaying authorities.

RESIDENTIAL CAPITAL, LLC, ET AL.

29

1 The debtors are asking the Court to allow them to
2 continue to use their existing cash management systems and be
3 permitted to implement certain modifications to that system
4 that have been requested and agreed to by the debtors and the
5 debtors' pre-petition secured creditors.

6 The debtors have numerous debt facilities in place
7 with distinct pools of collateral. And in connection with the
8 commencement of these proceedings and discussions with the
9 debtors' DIP lender, Barclays, the debtors' DIP lender asked
10 that the debtors create a closed loop, effectively, for their
11 collateral, to isolate the flow of funds from intermingling
12 with the debtors' corporate accounts and also to keep them from
13 intermingling with the collateral of other secured parties.
14 The debtors created similar silos for each set of its lenders,
15 including cash collateral providers, and by this motion seek
16 the Court's permission to implement this modified structure.

17 As a fiduciary, the debtors believe that these systems
18 are appropriate to minimize risk to a secured lender's
19 collateral.

20 Now, through this cash management system, Your Honor,
21 the debtors will be able to track cash flows by secured credit
22 facility and ensure that expenses with respect to such facility
23 are allocated to that facility. And so the relief that's being
24 requested in this motion, Your Honor, goes hand-in-hand with
25 the relief being requested next week in connection with the

RESIDENTIAL CAPITAL, LLC, ET AL.

30

1 debtors' cash collateral and DIP financing motions.

2 Now, under this motion, the debtors propose to provide
3 their depository banks with the customary protections. For
4 example, the banks are authorized to -- as part of their cash
5 management services to the debtors, to continue to make
6 deductions from accounts as appropriate. The debtors (sic) are
7 restrained and prohibited from honoring pre-petition debits
8 unless certain conditions are met, including being authorized
9 by the debtors or directed by the debtors to make such payment
10 or that such payment's been authorized by an order of the
11 Court, and that the payment is supported by sufficient funds in
12 the relevant bank account.

13 Each bank that maintains one or more bank account will
14 implement customary handling procedures to effectuate the terms
15 of the proposed order. And to the extent they comply with the
16 terms of the order in good faith or rely on direction given by
17 the debtors, they will not be held liable for any -- I guess,
18 any inadvertent payment of a pre-petition debit. These are
19 typical provisions that are in these orders.

20 Now, the debtors are also asking, as part of the
21 motion, to be able to continue to use their stock of checks and
22 letterhead, until such time as they run out, in which case
23 they'll order new checks. And I'm not sure how many checks
24 they're using.

25 THE COURT: Are they stamping them?

RESIDENTIAL CAPITAL, LLC, ET AL.

31

1 MR. MARINUZZI: I do not believe they are stamping
2 them, Your Honor.

3 No, they're not stamping them, Your Honor. If Your
4 Honor wishes for us to stamp them, we will stamp them.

5 THE COURT: I'll wait and hear --

6 MR. MARINUZZI: Okay.

7 THE COURT: -- from the U.S. Trustee on it.

8 MR. MARINUZZI: We're not stamping them is the answer.

9 Now, the U.S. Trustee filed -- oh, I'm sorry. One
10 other aspect of this that I wanted to highlight for the Court.
11 The debtors seek permission to continue their ordinary-course
12 practice of making interdebtor transfers. And the debtors
13 propose to provide the transferor estate with an administrative
14 claim against the transferee estate, to provide protection for
15 the creditors for that estate.

16 Now, the U.S. Trustee filed an objection to the
17 motion. And the objection was based on our request for a
18 waiver of Section 345(b). And there was some confusion caused
19 by the papers using the word "custodial accounts", lowercase,
20 and "Custodial Accounts", uppercase.

21 And so when the motion talks about custodial accounts,
22 there are custodial accounts that are the debtors' custodial
23 accounts maintained by, for example, JPMorgan Chase, that has a
24 lockbox, into which mortgage payments are mailed. That's a
25 custodial account, but it's our custodial account.

RESIDENTIAL CAPITAL, LLC, ET AL.

32

1 Then there are the thousands of T&I and P&I custodial
2 accounts that is not property of the debtors' estates. And
3 those are the capital C, capital A Custodial Accounts that are
4 in the motion. So we apologize for that confusion, and have
5 since spoken with the U.S. Trustee to make sure that the U.S.
6 Trustee understands that there's a difference, and to let the
7 Court know that we've had that discussion.

8 THE COURT: Let me ask. I'll let you finish, but has
9 this motion been resolved? Have you reached an agreement with
10 the U.S. Trustee or not?

11 MR. MARINUZZI: Your Honor, I believe we have. And
12 we're asking the Court to find that the Custodial Accounts,
13 capital C, capital A, are not property of the debtors' estates,
14 and so 345 doesn't apply; no waiver is necessary. So to the
15 extent --

16 THE COURT: Well, let me ask you this question. 345
17 talks about money in the estate. 541 is property of the
18 estate. Nobody has addressed whether those get the same or a
19 different interpretation. But let's deal with 345. Let's
20 assume that you had escrow accounts in your name.
21 Unquestionably, the property belongs to others. You still have
22 legal title to the accounts.

23 I mean, 541, it's all legal or equitable interests in
24 property. I guess my concern was, let's assume -- and I know
25 this is not the case here -- but let's assume --

RESIDENTIAL CAPITAL, LLC, ET AL.

33

1 Whoever is on the phone, you're going to need to --
2 you ought to put your phone on mute, because we're picking up a
3 lot of noise in your room. So if you don't want to be cut off
4 from the call, you better put your phone on mute.

5 All right. Let's assume you have this escrow account,
6 and it happens to be the brother-in-law of one of your senior
7 executives who has this community bank that's not FDIC-assured.
8 And let's assume you're keeping twenty million dollars there.
9 Are you saying that 345 doesn't apply in that circumstance? I
10 mean, it's -- if you lose -- if the money is gone tomorrow, the
11 debtor could very well be liable for that loss, for having
12 deposited the money in the account. And it would have a direct
13 impact on the estate. So you're saying 345 -- if the money in
14 the account ultimately belongs to somebody else, but you have
15 possession of it and it's deposited in an account in your name,
16 even though it's a custodial or escrow account, are you saying
17 345 doesn't apply?

18 MR. MARINUZZI: Well, Your Honor, a couple of
19 responses. I think if under the agreements pursuant to which
20 you or the debtors are given authority to put money in a
21 financial institution, the party entrusting the debtors to make
22 that deposit hasn't provided specific instructions on what to
23 do to protect the cash that is entrusted to them, then I would
24 argue they've allowed the debtors to make that determination.

25 THE COURT: You said in paragraph 14 of the reply that

RESIDENTIAL CAPITAL, LLC, ET AL.

34

1 "The funds in the Custodial Accounts," capital C, capital A,
2 "belong to third parties, not to the debtors. In addition, the
3 debtors' disposition of the funds is governed by explicit terms
4 of pre-existing agreements, negotiated at arm's length, which
5 if breached, could threaten the debtors' ability to continue
6 its servicing business."

7 And the question I had was -- and this wasn't clear to
8 me -- do the agreements specify the banks in which the deposits
9 are to be held? And do you need -- I mean, in reading the
10 reply, I couldn't tell whether you needed the consent of any
11 third parties to move the funds to a different depository.

12 MR. MARINUZZI: You do, Your Honor. Not all
13 agreements are the same. Certain agreements require that the
14 cash be put in an institution that has a specific rating.
15 Certain agreements require that the cash be placed at a
16 specific bank. Many agreements require that if you're closing
17 accounts that are holding this money in custody, you have to
18 get the consent of the party that's entrusted you --

19 THE COURT: Let me ask.

20 MR. MARINUZZI: -- with that responsibility.

21 THE COURT: Do I need to make a decision that none of
22 these funds are property of the estate in order to grant the
23 relief you're seeking? That's where I am. It didn't seem to
24 me that I did. It seemed to me that -- and I want to hear from
25 Mr. Masumoto about what agreement you reached with the U.S.

RESIDENTIAL CAPITAL, LLC, ET AL.

35

1 Trustee. But on the showing you've made, I'm very reluctant
2 to, and I'm not going to, reach a decision as to whether the
3 funds in these accounts are money of the estate under 345,
4 property of the estate under 541. It didn't seem to me you --
5 in your lead in, you said you're asking me to make that
6 finding. And I'm resisting making that finding.

7 MR. MARINUZZI: I see that, Your Honor.

8 THE COURT: But I didn't think I needed --

9 MR. MARINUZZI: I see the subtlety.

10 THE COURT: -- to. If I need to, explain to me why.

11 MR. MARINUZZI: Well, Your Honor, we're asking for a
12 waiver of 345. And --

13 THE COURT: But that could be -- assuming that the
14 requisite showing has been made, and Service Merchandise is the
15 only case I'm familiar with -- you cited it in your reply --
16 where the Court dealt explicitly with a list of factors for a
17 court to consider in deciding whether cause has been
18 established for a waiver; that that waiver assumes that it's
19 money of the estate.

20 MR. MARINUZZI: Your Honor, we're asking for a waiver.
21 If the Court is of the view that Your Honor can grant a waiver,
22 that we've shown cause based on the facts that we're putting
23 into the record, then that serves our purposes. I understand
24 Your Honor's reluctance.

25 I will point out, though, Your Honor, in 345 -- and

RESIDENTIAL CAPITAL, LLC, ET AL.

36

1 this doesn't answer the question definitively, obviously -- but
2 345 talks about money of the estate. And so the estate is
3 defined by, in my view, 541 and what becomes property of the
4 estate. We don't -- we may not need to address it, Your Honor.
5 Again, the point of the motion --

6 THE COURT: 541 provides that property of the estate
7 is anything you have that's has either legal or equitable --

8 MR. MARINUZZI: Equitable.

9 THE COURT: -- interest.

10 MR. MARINUZZI: Understood.

11 THE COURT: And you may not have an equitable interest
12 if the funds are held in custody for a third party. But you
13 ordinarily would have a legal interest. The account would be
14 in the name of whatever the ResCap entity is, either for the
15 benefit of or some other designation, to indicate that it was a
16 custodial account. But you'd have legal title. Am I wrong on
17 that?

18 MR. MARINUZZI: Well, the account is in the name of
19 the debtor for the purpose of holding money for -- it's not the
20 account, necessarily; it's the cash that's in there, the money
21 that's in there, is earmarked property of third parties.

22 THE COURT: Let me hear from Mr. Masumoto. Maybe we
23 can short circuit this. Because it's not clear to me that I
24 need to make a determination as to whether -- who the money
25 belongs to. Mr. Masumoto?

RESIDENTIAL CAPITAL, LLC, ET AL.

37

1 MR. MASUMOTO: Good morning, Your Honor. Your Honor,
2 as indicated, just at the outset, just to sort of set the
3 framework, our objection with respect to the Section 345 is
4 that we believe that the requirements should be maintained and
5 that the waiver should not be granted.

6 With respect to the waiver, specifically the objection
7 to the waiver aspect dealt with the thirty-six million dollars
8 that they identify that --

9 THE COURT: That's in the Ally Bank.

10 MR. MASUMOTO: That's at Ally Bank. And that's what
11 they're seeking -- from our standpoint, that was the waiver.

12 The other aspect that you've been discussing with
13 debtors' counsel, from our perspective we identified as
14 essentially the custodial accounts, which are funds that
15 allegedly were by third -- borrower payments and that belong to
16 a third party. From our standpoint, we did get clarification
17 from the debtor that contrary to what we saw in the motion,
18 where a custodial account, small c, included debtor funds, that
19 in fact, what they were seeking a determination by the Court,
20 were that these accounts were not subject to Section 345.

21 From our standpoint that's a distinction and different
22 from a 345 waiver, per se. They're attempting to determine
23 that these capital C, Custodial Accounts were essentially not
24 monies of the estate. From our standpoint, we did agree that
25 so far as they clarified that the amounts in these accounts did

RESIDENTIAL CAPITAL, LLC, ET AL.

38

1 not include debtor funds or cash of the debtor, as we
2 interpreted the motion to say, that from our standpoint, we did
3 not wish to interfere with their processing of borrower
4 payments and the payments to the beneficial owners of those
5 amounts.

6 So we agreed that to the extent that they established
7 that there were no debtor cash in those accounts, and that they
8 met that burden with the Court, we would agree to take the
9 position that Section 345 and the requirements of posting
10 collateral or being at an authorized depository that's
11 collateralized at the Fed, would not be imposed on those
12 accounts.

13 THE COURT: Were you ever able to satisfy yourself as
14 to the institutions where those funds are being held, as to
15 whether they're FDIC-insured or not? I know there's a lot of
16 accounts.

17 MR. MASUMOTO: Well, Your Honor, initially, during our
18 initial negotiations with the debtor, we did confirm, in fact,
19 that these custodial accounts -- and at that time, we didn't
20 make a distinction between the capital C and the small c --
21 that all these accounts were at authorized depositories. But
22 as Your Honor indicated, the intent and the outcome of their
23 determination that it's not subject to 345 is, even if it is at
24 an authorized depository, these custodial accounts will not be
25 collateralized. So they would not be protected in the event of

RESIDENTIAL CAPITAL, LLC, ET AL.

39

1 a bank failure.

2 But having said that, it's also our understanding that
3 these accounts are not protected by the FDIC insurance or by
4 any of the protections offered by the FDIC. I mean, that's
5 based on what would seem commons sense, in that there are over
6 3,000 accounts. Even if you multiply that by 250,000, that's
7 less than a billion dollars. So they claim they have 4.6
8 billion dollars in these accounts. So clearly, at least one or
9 more of the accounts have to be in excess of the FDIC
10 protection.

11 So we do understand that in many cases, many of the
12 accounts would not be fully protected under FDIC protections,
13 absent, I guess, one other qualification. Currently the FDIC,
14 in addition to the 250,000 limit, does protect demand deposits,
15 essentially noninterest-bearing deposits. So if, in fact,
16 these accounts are in noninterest-bearing deposits, arguably,
17 more of them would be protected under the FDIC.

18 THE COURT: Let me ask. Can you shed light on the
19 difference between 345 and 541, where 345 talks about money of
20 the estate and 541 is property of the estate?

21 MR. MASUMOTO: Your --

22 THE COURT: Nobody's addressed that in the briefs.
23 That's why my reluctance to decide on the basis of the record
24 before me that 345 does not apply. The debtor has said it but
25 hasn't really given me any legal authority to support -- you

RESIDENTIAL CAPITAL, LLC, ET AL.

40

1 know, they attach Refco and they attach Enron, which were both
2 541 decisions and not 345 decisions.

3 MR. MASUMOTO: Your Honor, we did not address that
4 with the debtor. We took the position that they needed to
5 establish that they satisfied the requirements of 345. We did
6 not take an official position with respect to the debtor as to
7 that distinction. It was never raised.

8 THE COURT: And what is your position as to the
9 thirty-six million dollars that's in Ally Bank? And in the
10 reply they came back and said they're required to keep that --
11 that Reg W requires that Ally -- because of the money that Ally
12 has advanced, they're required to keep that as collateral.

13 MR. MASUMOTO: Your Honor, as indicated, the position
14 of the program is that we believe that those funds should be
15 protected. They're subject to 345, and accordingly, should be
16 accorded -- should comply with the requirements under Section
17 345.

18 THE COURT: Have you made an analysis specifically
19 focused on the financial strength of Ally Bank?

20 MR. MASUMOTO: No, Your Honor. We don't do that,
21 because we -- normally, by asserting that the requirements do
22 apply, we eliminate that sort of individualized calculation
23 about various financial institutions. If it is an authorized
24 depository, and they collateralize the funds as required by the
25 Code, the strength of the financial institution is not an

RESIDENTIAL CAPITAL, LLC, ET AL.

41

1 issue.

2 THE COURT: Well, but if I apply Service Merchandise,
3 which is at 240 B.R. 894 (Bankr. M.D. Tenn. 1999), it's really
4 the only case I'm familiar with that deals with -- it
5 identifies ten factors for a court to consider in determining
6 whether to grant a waiver of 345. And one of the factors that
7 specifically that Service Merchandise identifies, the fourth
8 factor, is the bank ratings; Moody's and Standard & Poor (sic)
9 of the financial institutions where debtor-in-possession funds
10 are held. So applying Service Merchandise, that becomes a very
11 relevant factor: what's the strength of Ally Bank, where the
12 funds are being held.

13 The other factors -- I won't go through each of
14 them -- I think many of the debtor -- and in the reply they
15 specifically cite to Service Merchandise. So I don't think you
16 can get off quite so easily. They've asked for the waiver.
17 The factors that have been identified, at least in the Service
18 Merchandise, the ten factors would include the strength of the
19 bank that's holding the funds. Here they argue that they're
20 required to be held there because of Reg W.

21 MR. MASUMOTO: Your Honor, as indicated, we normally
22 leave the question as to whether or not the debtors satisfy the
23 burden for cause to be excepted from 345 to the Court. We do
24 not weigh in on that factor. And I cannot speak to the issue
25 as to whether or not a debtor satisfies 345. That is an

RESIDENTIAL CAPITAL, LLC, ET AL.

42

1 evidentiary matter that we leave to the Court.

2 THE COURT: Thank you, Mr. Masumoto.

3 MR. MASUMOTO: Thank you, Your Honor.

4 THE COURT: Who else wants to be heard on this? Mr.
5 Eckstein?

6 MR. ECKSTEIN: Your Honor, we obviously understand the
7 U.S. Trustee has specific positions with respect to debtor
8 accounts. Our view is that this is property of the estate. I
9 would view 345 as being a subset of property of the estate. So
10 we assumed it was property of the estate.

11 THE COURT: You assumed the small C, custodial
12 accounts are prop -- even though --

13 MR. ECKSTEIN: That's how we look at it. But that's
14 just in response to that inquiry.

15 But nonetheless, we were satisfied from a business
16 standpoint that given the success Ally has had with ResCap
17 assets, we were comfortable --

18 THE COURT: Well, that's true as to the thirty-six
19 million. The 1.4 billion, or whatever that number is, is
20 spread around a lot of banks.

21 MR. ECKSTEIN: Correct.

22 THE COURT: Have you been provided a list of where the
23 funds are deposited?

24 MR. ECKSTEIN: I don't believe we have seen a list, at
25 this point, of where all the funds are deposited. We know that

RESIDENTIAL CAPITAL, LLC, ET AL.

43

1 they're not otherwise -- with the exception of this account --

2 Your Honor, I'm told, now, we do in fact, have the
3 list. So --

4 THE COURT: Okay. Thank you.

5 MR. ECKSTEIN: We were satisfied that this -- there
6 was a sufficient business reason for this exception. And
7 subject to the U.S. Trustee's issue, the committee was
8 satisfied with that.

9 An alternative, Your Honor, if this can't be resolved
10 today, the servicing issue is going to be heard on the 18th.
11 And one alternative would be to revisit this issue in
12 connection with the motions that are on for the 18th. Although
13 I don't want to clutter the calendar any further. But that was
14 just an al --

15 THE COURT: We'll deal with that issue later.

16 MR. ECKSTEIN: We're otherwise, from a business
17 standpoint, satisfied with this exception.

18 THE COURT: All right. Anybody else wish to be heard?
19 All right, Mr. Marinuzzi?

20 MR. MARINUZZI: Your Honor, I just wanted to clarify
21 something. There are more than 3,200 "custodial accounts", and
22 they contain over four billion dollars in cash. 166 of those
23 more than 3,200 custodial accounts are at financial
24 institutions that are not on the U.S. Trustee SDNY-approved
25 list. Of those 166, 162 are at Ally. And those accounts

RESIDENTIAL CAPITAL, LLC, ET AL.

44

1 contain approximately -- and the amount fluctuates, and this is
2 in the declaration -- as of last week, the amount was 2.7
3 billion dollars.

4 Now, just a note about Ally. Ally Bank is a federal
5 bank, insured by and subject to the regulations of the FDIC.
6 Ally Bank is owned by bank holding company Ally Financial,
7 Inc., which is subject to the regulations of the Federal
8 Reserve. And of course, lest we forget, Ally Financial, Inc.
9 is approximately two-thirds owned by the United States
10 government. So --

11 THE COURT: I'm aware of that.

12 MR. MARINUZZI: -- I would like to think that the cash
13 on deposit at Ally is safe.

14 And, Your Honor, we appreciate that the Court may not
15 be able to rule on whether these deposits are property of the
16 estate. And frankly, we don't believe it's necessary for the
17 Court to rule, because we think we've made a showing under
18 Service Merchandise and the facts of this particular case, that
19 a 345 waiver for those custodial accounts that are not in SDNY-
20 approved locations, as well as the thirty-four million dollars
21 held in the Reg W account, warrant an exception from 345.

22 THE COURT: All right. Anybody else wish to be heard?

23 MR. ECKSTEIN: Your Honor --

24 THE COURT: Mr. Eckstein?

25 MR. ECKSTEIN: -- just one more clarification. I do

RESIDENTIAL CAPITAL, LLC, ET AL.

45

1 want to point out that paragraph 21 of the proposed order now
2 provides that nothing in the order shall authorize a setoff.
3 And that was provided specifically in the order, which was
4 obviously important --

5 THE COURT: Thank you.

6 MR. ECKSTEIN: -- reaching the conclusion.

7 THE COURT: All right. I'm going to grant the motion
8 to continue the cash management system. On this issue -- the
9 only issue as to which the U.S. Trustee has raised an
10 objection -- the issue of waiver under Section 345(b), first
11 the Court makes no finding with respect to whether either small
12 c, custodial accounts or capital C, Custodial Accounts, whether
13 funds in deposit in either group of those accounts is property
14 of the estate or not.

15 Nevertheless, based on the showing made by the
16 debtors -- and I'll specifically refer to the supplemental
17 Whitlinger declaration in particular -- applying the Service
18 Merchandise standards -- and I cited the case previously; it's
19 the Bankruptcy Court of the Middle District of Tennessee --
20 it's the first decision after Columbia Gas Systems, the Third
21 Circuit case, that had said it wasn't discretionary. Congress
22 revised the statute to allow a waiver for cause.

23 The Court has considered the factors identified in
24 Service Merchandise, and the overwhelmingly large number of
25 those ten factors support a waiver as to all of the accounts in

RESIDENTIAL CAPITAL, LLC, ET AL.

46

1 question here: the sophistication of the debtors' business;
2 the size of the debtors' business operations. It would be
3 extremely difficult, given the number of accounts, the number
4 of agreements that require funds be deposited in specific
5 accounts to alter that practice now. The amount of the
6 investments involved -- it's very large. It's very large. I
7 think the clarification as to how much of it is in -- 2.7
8 approximately billion -- in Ally Bank it's obviously a very
9 large number.

10 I don't have any information on the bank ratings of
11 Ally Bank. The complexity of the case certainly supports
12 granting the waiver here. The safeguards in place within the
13 debtors' own business, I'm satisfied that careful accounting is
14 kept of where the deposits are and the flow of funds within
15 each of the accounts.

16 The seventh factor that Service Merchandise looked at
17 was the debtors' ability to reorganize in the face of a failure
18 of one or more of the financial institutions. With the
19 exception of the amount that's on deposit at Ally Bank, while
20 the others may be large, they still pale in comparison.

21 The harm, if any to the estate. If I were to turn
22 this motion down, it would add great complexity and uncertainty
23 in this case.

24 And the reasonableness of the debtors' request for
25 relief under 345(b) requirements in light of the overall

RESIDENTIAL CAPITAL, LLC, ET AL.

47

1 circumstances of the case; I would conclude that those
2 overwhelmingly support granting the waiver.

3 So it's on the basis of the waiver of 345(b) that I'm
4 approving the continuation of the deposits. Let me just say,
5 if at any point in the case the U.S. Trustee wishes to revisit
6 the issue as to specific financial institutions in which funds
7 are deposited, I would entertain that. I just want to make
8 that clear. But I'm limiting it to that specific area, since
9 Mr. Eckstein has said, the committee has at least seen the list
10 of institutions where funds are deposited. That ought to be --
11 that list ought to be shared with the U.S. Trustee's Office, if
12 it has not already had an opportunity to see that.

13 And if it wishes to raise specific issues as to
14 institutions included, a) you ought to, in the first instance,
15 see whether you can resolve the issue with the debtor, either
16 by the debtor agreeing to a transfer to another institution;
17 and the failsafe position is to come back to court. But only
18 as to specific institutions, after you've had an opportunity to
19 review the list and if issues have arisen. All right?

20 MR. MARINUZZI: Your Honor, thank you very much.
21 We'll modify the order to reflect that there's no finding as to
22 whether the cash is property of the estate.

23 THE COURT: Okay.

24 MR. MARINUZZI: I would note also that an exhibit to
25 the motion is a 146-page list of bank accounts. So it includes

RESIDENTIAL CAPITAL, LLC, ET AL.

48

1 all the accounts.

2 THE COURT: Okay. Thank you, Mr. Marinuzzi.

3 MR. MARINUZZI: Thank you. I'm sorry, Your Honor.

4 I'll cede the podium to my partner, Norm Rosenbaum.

5 THE COURT: Thank you.

6 MR. ROSENBAUM: Good morning, Your Honor. Norm
7 Rosenbaum for the debtors. Your Honor, taking up the matters
8 as they're listed on the agenda, number 5, I think it would
9 make sense if I address that first. And that, number 5, docket
10 number 58, relates to item number 7, which is docket number 57,
11 which is our motion to continue servicing government
12 association loans in the ordinary course. So I can explain why
13 number 5 is relevant to --

14 THE COURT: Just stay in -- this is that one document
15 that Judge Peck agreed to allow to be sealed pending the
16 hearing.

17 MR. ROSENBAUM: Yes.

18 THE COURT: And somebody handed me an envelope just
19 before the start of the hearing with that document in it, which
20 I left on my desk. Everybody just stay in place; don't get up
21 when I come back in.

22 (Pause)

23 THE COURT: Okay. Go ahead.

24 MR. ROSENBAUM: Thank you, Your Honor. The exhibit
25 that Judge Peck directed and approved to be filed under seal is

RESIDENTIAL CAPITAL, LLC, ET AL.

49

1 a set of --

2 THE COURT: I think he said he didn't really
3 understand what it was about or something to that effect. But
4 he agreed to seal it pending today's hearing.

5 MR. ROSENBAUM: He did, Your Honor. The exhibit is
6 actually an exhibit to the GA servicing motion. And what it
7 represents is a set of benchmarks that Freddie Mac has
8 established and negotiated with the debtors. And these are
9 performance-based metrics on servicing.

10 And they were negotiated over a period of time. And
11 what we, the debtors, agreed to as part of the servicing
12 motion, was that if the debtors failed to meet any one of these
13 benchmarks, Freddie Mac would have the right to come in and
14 remove servicing from the debtors. So it's a significant
15 issue, and it was negotiated quite rigorously.

16 After filing the -- obtaining the order to file the
17 exhibit under seal, once the committee was appointed and
18 retained counsel, we did share that exhibit with the committee.
19 It's been reviewed by the Office of the United States Trustee
20 as well.

21 The committee -- and this was included in their
22 omnibus objection to the first day motions -- the committee did
23 raise a concern with the metrics, obviously not identifying
24 what was of concern to them. Subsequent to that time, we had
25 discussions among the debtors, the committee, and Freddie Mac.

RESIDENTIAL CAPITAL, LLC, ET AL.

50

1 And Freddie did agree -- Freddie Mac did agree to modify two of
2 the metrics to provide more cushion to the debtors in their
3 ability to meet those. That was satisfactory to the debtors
4 and satisfactory to the committee. So it would resolve one of
5 the committee's -- really, the only committee's objection to
6 the servicing. And on that basis, Your Honor, that's the
7 genesis of the exhibit.

8 Freddie Mac feels very sensitive about the information
9 contained here. It's servicer-specific. They have expressed
10 that concern and requested that it be filed under seal. The
11 debtors have concerns as well. But we really defer to Freddie
12 Mac on this.

13 They did submit, in connection with the motion to
14 continue to keep it under seal, the declaration of Yvette
15 Gilmore, which is filed with the Court as docket number 260.

16 THE COURT: I'm sorry, say that again.

17 MR. ROSENBAUM: In support of the motion --

18 THE COURT: Just give me the --

19 MR. ROSENBAUM: Oh.

20 THE COURT: -- ECF document number.

21 MR. ROSENBAUM: 260.

22 THE COURT: Go ahead. Anything else you want to say?

23 MR. ROSENBAUM: On the seal, Your Honor, no. We'd
24 request that Your Honor enter the order.

25 THE COURT: Anybody else wish to be heard? Mr.

RESIDENTIAL CAPITAL, LLC, ET AL.

51

1 Masumoto, do you want to be heard? Your office usually has
2 strong views on sealing.

3 MR. MASUMOTO: Your Honor, we believe that the sealing
4 order that has been narrowly tailored -- we saw what was
5 provided. We would like to see a copy of the final order. But
6 we have no further objections.

7 THE COURT: All right. Does the committee wish to be
8 heard?

9 MR. MANNAL: We have no objection to the sealing, Your
10 Honor.

11 THE COURT: I hadn't read the declaration. Let me do
12 that now.

13 MS. NORA: Your Honor, this is Wendy Alison Nora. Did
14 I understand the Court to say that all of my objections to all
15 of these motions that are being heard today have been
16 overruled?

17 THE COURT: No. I overruled your objection to the one
18 motion that I heard earlier.

19 MS. NORA: Thank you, Your Honor. I did not object to
20 this particular motion. I was objecting to the sealing of the
21 Barclays financing --

22 THE COURT: Ms. Nora, Ms. Nora --

23 MS. NORA: Yes.

24 THE COURT: When it comes to a motion that you do
25 object to, I'll give you an opportunity to speak. But I'm in

RESIDENTIAL CAPITAL, LLC, ET AL.

52

1 the --

2 MS. NORA: Thank you.

3 THE COURT: -- midst of reading something relating to
4 the matter currently before the Court. So why don't you just
5 remain on the line and go answer the door.

6 (Pause)

7 THE COURT: Is there anyone from Freddie Mac here?

8 MR. MOAK: Your Honor, Paul Moak with McKool Smith on
9 behalf of Freddie Mac.

10 THE COURT: So the question I have for you is I have a
11 published opinion in Borders, a memorandum opinion granting
12 debtors' motion to seal KOBO share purchase agreement. I've
13 written three or four opinions on sealing. The Borders opinion
14 was December 7th, 2011. I don't have the Bankruptcy Reporter
15 citation. But one of the things -- and Borders is not the only
16 one that I've done it in -- but there's a section in the
17 opinion called "Presumption favoring public access to court
18 records". That's well-established. There's another section on
19 "The redacted SPA properly protects the commercial
20 information". And I think what I've held was that generally
21 redaction, rather than entire sealing is the appropriate way.

22 So why should this entire document be sealed as
23 opposed to redacted?

24 MR. MOAK: Your Honor, candidly, our preference,
25 obviously, would be to have the entire sealed but --

RESIDENTIAL CAPITAL, LLC, ET AL.

53

1 THE COURT: I know. But so tell me why. I'm sure
2 it's your preference. But why isn't redaction a suitable
3 response? And I'm not saying that it shouldn't be sealed.
4 It's only a single page. And so tell me why the entire
5 document should be sealed as opposed to redacted.

6 MR. MOAK: Your Honor, I guess our position would be
7 to protect the information that is the most sensitive to
8 Freddie Mac, we would have to redact it, I believe, in a way
9 that would render the rest of the exhibit, I would assume,
10 meaningless to people who had access to it. So from our
11 perspective, we're not certain whether a redacted version
12 provides more transparency than filing the entire document
13 under seal.

14 But I guess, if you're asking us whether we can review
15 it and present to you a redacted version, I would have to
16 consult with Freddie Mac and give you a --

17 THE COURT: I didn't ask you to do that yet. But
18 look, I set out in an opinion a standard that applies to
19 sealing. And I've said that the strong presumption is that
20 things should be redacted rather than sealed. And I'm giving
21 you a chance to explain to me now why this document, the entire
22 document, should be sealed rather than having it redacted.

23 MR. MOAK: Your Honor --

24 THE COURT: I'm not trying to set you up.

25 MR. MOAK: -- I hear you.

RESIDENTIAL CAPITAL, LLC, ET AL.

54

1 THE COURT: What I'm trying to do is apply what I've
2 said the standard is.

3 MR. MOAK: Your Honor, I understand what you're
4 saying. I guess the answer, Your Honor, would be, the extent
5 to which redaction would be permitted -- I guess we could get
6 satisfied, depending upon what the Court would deem to be
7 satisfactory redaction of the document. So if you'd like me to
8 consult with Freddie Mac and provide you with a redacted copy,
9 I believe we could do that.

10 THE COURT: What's the relevance of this document to
11 the issue -- it relates to the subsequent motion, correct?

12 MR. MOAK: That's right, Your Honor. It's part of the
13 debtors' motion to approve the continuation of its servicing
14 with the -- I believe it terms us the governmental associations
15 or entities.

16 THE COURT: Let me hear from debtors' counsel. Why
17 does this have to be -- what's the relevance of this exhibit to
18 the servicing motion? I guess what I'm trying to find out is
19 why do I need this at all? Maybe I do.

20 MR. ROSENBAUM: These performance benchmarks were
21 negotiated between the debtors and Freddie Mac, and they're --
22 a failure to meet any one of those benchmarks, pursuant to what
23 Judge Peck approved and what the agreement in between Freddie
24 Mac and the debtors is, Freddie Mac would have the right to
25 pull servicing of its loans, which are several hundred

RESIDENTIAL CAPITAL, LLC, ET AL.

55

1 thousand, billions of unpaid principal. So I would say --

2 THE COURT: I'm persuaded. I'm persuaded about the
3 importance of it.

4 MR. ROSENBAUM: It's sensitive data -- Mr. Moak will,
5 I'm sure interrupt me if I go too far -- it's sensitive data
6 specific to the debtor GMAC's performance as it relates to how
7 GMAC services the Freddie pool of loans. It's specific to GMAC
8 in several respects. And it's measured against other
9 benchmarks. But the position of Freddie Mac, and the debtors
10 as well, as we agree with that and we're sensitive to this
11 issue as well, is this is specific in now Freddie Mac is
12 treating one servicer. I think other servicers would be very
13 interested in seeing this data. And it could have negative
14 impacts, I think, for the debtor, but more so to the way
15 Freddie Mac manages its other servicers.

16 THE COURT: I mean, here is what I said in Borders.
17 "In cases where protection is required, however, the form of
18 protection that must be granted is not commanded by the
19 statute. The Court has discretion when deciding how to protect
20 commercial information. See Gitto, 422 F.3d at 9 ("It is true
21 that Section 107(b)(2) speaks of protection in general terms
22 rather than of wholesale sealing, and that courts must
23 therefore exercise some discretion in determining what form of
24 protection to grant."). Redacting documents to remove only
25 protectable information is preferable to wholesale sealing.

RESIDENTIAL CAPITAL, LLC, ET AL.

56

1 The policy favoring public access supports making public as
2 much information as possible while still preserving
3 confidentiality of protectable information. See, e.g., Nixon
4 v. Warner Communications, Inc., 435 U.S. 589, 597-98 (1978)."

5 And my law clerk has just handed me my Borders
6 decision is at 462 B.R. 42.

7 MR. ROSENBAUM: Your Honor, I think I'd have concur
8 with Mr. Moak that it's -- to redact this would render it
9 meaningless. One would not be able to glean what the
10 benchmarks were by what would have to be redacted.

11 THE COURT: Well, let me -- is it fair to say that the
12 amended Freddie Mac servicing transfer metrics establish seven
13 specific metrics that the debtor must satisfy. It sets forth
14 what each metric is; it provides a "logic" for the established
15 metric; it sets a benchmark, either in a number or a
16 percentage; and then it sets forth a time frame within which
17 the debtor must comply with a metric. Is that a fair
18 statement?

19 MR. ROSENBAUM: That's a fair statement, Your Honor.

20 THE COURT: So tell me what happens if the debtor
21 fails to comply with any one metric? Do you get notice? Do
22 you get time to cure? What happens?

23 MR. ROSENBAUM: Based on the agreement which is part
24 of our motion and order which we're asking Your Honor to
25 approve on a final basis today, Freddie Mac has the right to

RESIDENTIAL CAPITAL, LLC, ET AL.

57

1 remove all or some of the loans serviced in the Freddie Mac
2 pool, on notice --

3 THE COURT: Without any further notice?

4 MR. ROSENBAUM: With notice, but it's -- there is not
5 an opportunity, as per the agreement in the interim order, for
6 the debtors to challenge that.

7 MR. MOAK: Your Honor, if I might?

8 THE COURT: Go ahead.

9 MR. MOAK: I've consulted with Freddie Mac, and we are
10 prepared to offer to the Court a redacted version of the
11 metrics. I don't know the best way -- maybe to try to hand it
12 up at the end of the hearing and revisit this issue --

13 THE COURT: Well, I don't need it today, but --

14 MR. MOAK: Okay. So we're willing to do that.

15 THE COURT: See if you can work with -- let me ask you
16 this. Work with the debtors' counsel, the committee, and the
17 U.S. Trustee, all of whom have seen the specific. I recognize,
18 I think it would be difficult -- I can see where it would be
19 difficult to redact it in such a way as you're disclosing
20 meaningful information.

21 My concern is, you know, you set a bunch of metrics,
22 and when we get to the later motion, the consequences of
23 failing to comply with it can be quite serious. Okay. And the
24 issue for me -- and this where the transparency comes in -- are
25 creditors entitled to know what the risks that are being faced

RESIDENTIAL CAPITAL, LLC, ET AL.

58

1 as this case proceeds. This is obviously potentially a
2 substantial risk.

3 I don't question that the precise benchmarks that you
4 set, particularly if they're specific as to ResCap, are
5 confidential. They satisfy, under my Borders decision, or
6 Silicon Graphics, I wrote before that, would satisfy the 107(b)
7 standard for confidential information. That I'm not disputing.

8 So we're going to keep this under seal, and I will see
9 what -- I'll give you a week to see if you can come to an
10 agreement on an acceptable redaction. I'm not ruling as to
11 whether I would or would not seal it, as is. I think it would
12 be preferable if you can come up with a redacted form that
13 reasonably discloses the information that creditors ought to
14 know. Okay?

15 MR. MOAK: We'll do that, Your Honor.

16 THE COURT: I appreciate that. Thank you very much.

17 And if you come up with an agreement, you'll submit
18 something and we won't have another hearing on it unless I
19 specifically ask for it. Okay?

20 MR. MOAK: That's good to hear, Your Honor. Thank
21 you.

22 THE COURT: Thank you very much.

23 MR. ROSENBAUM: Your Honor, if I may, can we address
24 item number 7 on the agenda?

25 THE COURT: You may as well, since we've been.

RESIDENTIAL CAPITAL, LLC, ET AL.

59

1 MR. ROSENBAUM: That's docket number 57. And, Your
2 Honor, this is the debtors' motion to continue servicing
3 government association loans in the ordinary course of
4 business. The motion was approved on an interim basis pursuant
5 to an order entered by Judge Peck on May 16th.

6 Your Honor, since the time of the initial hearing and
7 subsequent to the filing of the motion, we've continued to work
8 with all the major constituents to this that are affected by
9 this relief, including Fannie Mae, Freddie Mac, Ginnie Mae,
10 Ally, AFI, and of course the debtors, and tried to address
11 constructively all of the concerns. There was a great deal of
12 information flow with the committee. A large part of it, the
13 past couple days, dealt with the metrics we just reviewed and
14 modifying those metrics in a way that were acceptable to the
15 committee.

16 I don't believe that any of the omni objections that
17 were filed really are objections to the servicing motions and
18 this particular motion. So at this time, it's a consensual
19 motion. We've made some changes as requested to the initial
20 order in the final form of -- form of final order, as requested
21 by the committee and Ally Bank and AFI. And some of those
22 affected or impacted what was in the interim order concerning
23 rights granted to Fannie Mae, Freddie Mac, and Ginnie Mae. But
24 through the process of meeting and cooperation, all the parties
25 are satisfied with the form of the order that's been filed with

RESIDENTIAL CAPITAL, LLC, ET AL.

60

1 the Court.

2 THE COURT: So one of the objections related to
3 providing preferential termination rights to Freddie Mac. Have
4 you dealt with that?

5 MR. ROSENBAUM: Well, we don't consider them
6 preferential.

7 THE COURT: Well, that was the argument. But what
8 did -- I'm not saying it is. But I just --

9 MR. ROSENBAUM: We believe that there's a strong
10 argument that Freddie Mac has that right to begin with.

11 THE COURT: Okay.

12 MR. ROSENBAUM: And we are asking, as part of this
13 bankruptcy, which in some respects is unprecedented what we're
14 trying to accomplish here, selling servicing rights as a going
15 concern, was very important, and we worked very hard for many
16 months to obtain the support of Fannie Mae, Freddie Mac, and
17 Ginnie Mae.

18 They expressed, understandably, the concerns of
19 working with the debtor. And these were part of the
20 concessions to obtain their support. We're hoping to continue
21 to have their support as we conclude this process through the
22 sale. They are going to have to make important decisions in
23 support of the sale at that time. And we felt this was a very
24 fair compromise, and it addresses their concerns.

25 THE COURT: One of the objections seemed to be that

RESIDENTIAL CAPITAL, LLC, ET AL.

61

1 you had split the servicing motions into two or three parts,
2 when really it all should be raised together.

3 MR. ROSENBAUM: I believe the reservation of rights
4 Your Honor is referring to is a reservation that the pooling
5 and servicing agreements or the origination of loans and the
6 servicing of loans, where they come up in agreements or
7 agreements that are integrated or agreements that relate to one
8 another should be considered one agreement, and that you cannot
9 segregate and divide the origination of loans from the
10 servicing of loans. Your Honor, that's clearly not our
11 position. I believe that's an issue for another day. But
12 those were rights reserved at the interim hearing and I believe
13 is part of some of the reservation of rights. I don't take
14 those as objections to these motions.

15 THE COURT: Does anybody else wish to be heard with
16 respect to the government association servicing motion? Mr.
17 Mannal?

18 MR. MANNAL: Your Honor, Doug Mannal, Kramer Levin,
19 proposed counsel for the creditors' committee.

20 Your Honor, the reason you have an amended exhibit
21 under seal is because we discussed with the debtors and with
22 Freddie Mac what we thought were more appropriate metrics. And
23 we worked with our financial advisor, Alex, to come up with
24 what we thought was appropriate in the circumstances.

25 Clearly we would rather there be no metrics, but the

RESIDENTIAL CAPITAL, LLC, ET AL.

62

1 debtors, as they indicated, had negotiated pre-petition and --

2 THE COURT: I'm sure it wasn't the debtors' choice to
3 arrive at those metrics.

4 MR. MANNAL: I don't think it was either. So, Your
5 Honor, with that, and with other modifications to the proposed
6 order, including putting a cap on certain critical servicing
7 payments of 19.6 million dollars, and certain reporting
8 requirements in connection with other payments and advances,
9 the committee has no objection.

10 THE COURT: Thank you. Anybody else? The U.S. -- Mr.
11 Masumoto, did you want to be heard?

12 MR. MASUMOTO: Your Honor, subject to the same request
13 previously, notice to the U.S. Trustee and review of the final
14 order, we have no objections.

15 THE COURT: All right. Anybody else want to be heard?

16 MR. AMINI: Very briefly, Your Honor. Bijan Amini on
17 behalf of National Association of Consumer Bankruptcy Attorneys
18 and a couple of the homeowners.

19 Our objections to 6, 7 and 8 are really to the
20 supplemental order, which is I think item 8. I just don't want
21 to waive that --

22 THE COURT: Okay.

23 MR. AMINI: -- on this one.

24 THE COURT: All right. Anybody else wish to be heard?

25 Let me ask you, I wrote notes to myself relating to --

RESIDENTIAL CAPITAL, LLC, ET AL.

63

1 let me find it -- the nongovernment association servicing
2 motion. But I want to -- it may apply here as well. The
3 motions, I understand, permit ResCap to continue what you would
4 refer to as business as usual, right?

5 MR. ROSENBAUM: Yes, Your Honor.

6 THE COURT: And one of those things that's business as
7 usual is the right to sell loans --

8 MR. ROSENBAUM: Real estate owned, Your Honor?

9 THE COURT: I'm sorry?

10 MR. ROSENBAUM: The real estate owned property or --

11 THE COURT: Well, not -- real estate owned is after
12 foreclosure's successful. So let's assume you've initiated
13 foreclosure and -- let me see. With the government association
14 loans, are those loans subject to the HAMP program?

15 Somebody just clicked the light switch. Thanks again.

16 MR. ROSENBAUM: Your Honor, all of the loans are --
17 the debtors' obligations under HAMP apply to all of their
18 servicing.

19 THE COURT: So here's --

20 MR. ROSENBAUM: I don't believe -- the debtors have
21 some loans they hold for sale and hold for investment. And
22 what we're seeking in that component of the motion was the
23 authority to do that. I don't think there's any intention --

24 THE COURT: Well, let me be --

25 MR. ROSENBAUM: -- of doing that.

RESIDENTIAL CAPITAL, LLC, ET AL.

64

1 THE COURT: -- very specific.

2 MR. ROSENBAUM: Sure.

3 THE COURT: Are you able to provide me with any
4 statistics on the number of loans that ResCap has sold while
5 the borrowers were in a HAMP trial period?

6 MR. ROSENBAUM: I don't have that. I think we would
7 be able to provide that, Your Honor.

8 THE COURT: Because, look, for two and a half years I
9 had the Chapter 13 calendar. I don't any longer. But I was
10 very active in creating the Southern District's Loss Mitigation
11 Program and follow even since I've given up the 13 calendar
12 that it still applies, loss mitigation applies in the other
13 chapters as well.

14 But one of the -- let me say, there are parties-in-
15 interest who allege that one of the abuses that has occurred in
16 the past, and I'm not making a judgment whether it is an abuse
17 or not, is when a borrower has been given a HAMP trial
18 modification that the loan gets sold and the buyer -- there may
19 be a month or two months into a trial period, have performed
20 perfectly, the loan gets sold and the buyer says, well, I don't
21 care, and you're forced to start all over, new documentation,
22 everything else.

23 And that's why I ask can you provide any statistics on
24 the number of loans sold while the borrowers were in a HAMP
25 trial period. I mean, you characterize this as a business as

RESIDENTIAL CAPITAL, LLC, ET AL.

65

1 usual, and the problem is that business as usual may not be
2 good enough. That's what, in part, led to various settlements,
3 and that's why I specifically want to know some information
4 about that.

5 MR. ROSENBAUM: Your Honor, may I have a moment?

6 THE COURT: Yes, you can.

7 MR. ROSENBAUM: Your Honor, we conferred with one of
8 the debtors' officers, and they don't sell loans that are part
9 of the HAMP trial process.

10 THE COURT: Okay. Would you put that in the order?

11 MR. ROSENBAUM: We can do that, Your Honor.

12 THE COURT: Okay. Because that is -- again, I don't
13 recall those instances occurring where ResCap or one of its
14 affiliates was involved, but this was more than an occasional
15 problem that occurs with respect to loan modifications. It
16 drives borrowers nuts; it drives debtors in Chapter 13 nuts
17 when they perform -- they think they're performing well for an
18 extended period of time, and lo and behold, the loan gets sold
19 and they're back at square one. So put in the order words to
20 the effect that you will not be selling loans that are in a
21 HAMP trial modification.

22 MR. ROSENBAUM: We will do that, Your Honor.

23 THE COURT: Okay. Anybody else wish to be heard?

24 Okay, then the motion -- let me just make sure my
25 other questions are -- anybody on the phone want to be heard on

RESIDENTIAL CAPITAL, LLC, ET AL.

66

1 this?

2 All right. The motion is granted.

3 MR. ROSENBAUM: Your Honor, since you addressed your
4 concerns with the non --

5 MS. NORA: Your Honor?

6 THE COURT: Yes.

7 MS. NORA: This is Wendy Alison Nora. I don't think
8 you were able to hear me.

9 THE COURT: I couldn't hear you. Go ahead. Do you
10 want to be heard? Go ahead.

11 MS. NORA: Yes, on 6, 7, and 8, Your Honor, the
12 concerns that I am trying to represent here are that the
13 homeowners that are in foreclosure, facing eviction, facing
14 foreclosures by advertisement, judicial states by action, that
15 there are forged documents being used by ResCap and its
16 affiliates in order to take these properties.

17 And that's why I have appeared here to get the Court's
18 supervision over more than just whether or not a HAMP loan is
19 sold in the process, but whether or not these foreclosures have
20 any legality at the core. And without the filing of the
21 Schedules and Statements of Financial Affairs as to what they
22 claim to own by having taken properties in this manner, the
23 actions in which they are proceeding, which would appear on the
24 Statement of Financial Affairs, by the continuing claims that
25 they own loans when they are mere servicers. For the sake of

RESIDENTIAL CAPITAL, LLC, ET AL.

67

1 the people who are suffering from the foreclosure holocaust, I
2 had just hoped that the Court would give us time to approach
3 the Court to use its equitable powers to supervise something
4 that we believe is an absolute scandal. And it has not just
5 been settled, as asserted by the debtors; they are under
6 sanctions to stop the very actions I've just described to this
7 Court, and they are continuing to take homes, to appeal on the
8 basis of forged documents, to defend themselves on the basis of
9 these documents, and it's a very serious matter, Your Honor.

10 THE COURT: Thank you.

11 Do you want to respond? I'm not sure -- what is
12 the -- in the debtors' view, does this have a bearing on this
13 specific motion, number -- the Government Association servicing
14 motion?

15 MR. ROSENBAUM: I don't believe it has much bearing on
16 either motion. I would add, though, that as part of both the
17 Government Association motion and the non-Government
18 Association, we are very clear that we are committed to
19 continue to comply with the consent order and the DOJ/AG
20 settlement. We are basically requiring, as part of the orders,
21 that we've been directed to do so and we have every intention
22 to do so.

23 In connection with the supplemental motion we haven't
24 heard yet, we've gone to great lengths to give borrowers, both
25 in foreclosure actions in judicial and nonjudicial states --

RESIDENTIAL CAPITAL, LLC, ET AL.

68

1 THE COURT: Let's hold -- because I do have some
2 issues with the supplemental motion, so we'll hold that. But
3 just focus on the two, the Governmental and non-Governmental
4 Association servicing motions.

5 MR. ROSENBAUM: Your Honor, what we heard was clearly
6 not evidence; it's argument. These are arguments that are made
7 in litigation around the country. We defend that litigation.
8 As part of the servicing, we are conducting foreclosures and
9 participating in bankruptcies. And it's our intention in this
10 bankruptcy case -- and not to go too far afield to the
11 supplemental, but I believe that that goes to the -- what I
12 heard was the core of the objection, that this is unfair
13 treatment. And we fully intend to have proper --

14 THE COURT: You don't question that using forged
15 documents in connection with foreclosure is unfair treatment?

16 MR. ROSENBAUM: No, Your Honor, I don't. And
17 that's -- but all we heard was an allegation, but --

18 THE COURT: Well, you say an allegation, but there are
19 enough reported decisions that specifically deal with this
20 issue that -- they may not involve ResCap. I've written some
21 opinions myself that have dealt with robo-signing of affidavits
22 in connection with foreclosure.

23 So I think you're straying if you're going to say
24 these are just allegations. They're much more than
25 allegations. They're taken very seriously. But I'm not sure

RESIDENTIAL CAPITAL, LLC, ET AL.

69

1 what bearing it has on either the Governmental Association or
2 the non-Governmental Association servicing motion. It may well
3 have a bearing on the supplemental servicing motion.

4 MR. ROSENBAUM: I don't believe it was, Your Honor. I
5 was trying to address the concern that was raised.

6 THE COURT: Anybody else wish to be heard? Okay.
7 Heard with respect to either the Governmental or the non-
8 Governmental servicing motions. We'll take them both together.

9 All right. Both of those motions are granted. The
10 Nora objection is overruled. The concerns that Ms. Nora raises
11 are very real concerns. I don't think they have a bearing
12 specifically on either of those two motions, and for that
13 reason I'm overruling the objection.

14 Okay, next?

15 MR. ROSENBAUM: Thank you, Your Honor. Just bear with
16 me one second.

17 THE COURT: Sure.

18 MR. ROSENBAUM: Your Honor, this brings us to the last
19 matter on this morning's agenda. This is docket number 181,
20 and this was number 8 on the agenda, and it's the debtors'
21 request for a supplemental order, primarily relating to
22 servicing.

23 Your Honor, in support of this motion, we've filed a
24 declaration of Sowite Bagrijian, the declaration of Joseph A.
25 Pensabene and the supplemental declaration of James Whitlinger.

RESIDENTIAL CAPITAL, LLC, ET AL.

70

Your Honor, we received one limited objection to this motion, which I'm happy to address. This motion really arose out of events which took place literally immediately upon the filing, and the genesis of this motion is really an effort to address issues relating to servicing of loans in the ordinary course, and really is a supplement to the servicing relief Your Honor just granted. We're trying to address ordinary course operations when it comes to loss mitigation, settlements, foreclosures, and bankruptcies.

And we work very hard, again, with different constituencies. The debtors have a substantial expertise in in-house counsel of managing both foreclosures and bankruptcies. They did also hear from literally hundreds of external counsel they manage, as well as defense counsel. And we worked very hard to come up with procedures and processes that'll govern foreclosures in all fifty states, in bankruptcies in all fifty states, literally thousands, to come up with a process that one would allow the debtors to continue to meet their servicing obligation when it comes to foreclosing on loans, engaging in loss mitigation, and protecting their rights as servicer as well as owner in bankruptcies.

The objective was to have appropriate relief in foreclosure actions that would allow borrowers to defend themselves fully to the foreclosure and raise any claims or objections and counter-claims that were necessary in order to

RESIDENTIAL CAPITAL, LLC, ET AL.

71

1 defend the action.

2 Where we've drawn the line, in terms of modifying the
3 relief from the stay, is to maintain the stay with claims and
4 counter-claims that clearly and only seek monetary relief. And
5 we believe that --

6 THE COURT: Let me ask you some specific questions.

7 MR. ROSENBAUM: Sure.

8 THE COURT: So if a borrower, in a state foreclosure
9 action or in a bankruptcy proceeding, files a TILA or a RESPA
10 claim on a loan that the debtors are seeking to foreclose, does
11 the relief under this motion permit the debtor to press the
12 TILA or RESPA claims?

13 MR. ROSENBAUM: They would have the opportunity to
14 press the TILA or RESPA if it was a defense to the foreclosure.
15 My understanding is that, for the most part, those are not
16 defenses to foreclosures, but it may be state-specific as to
17 how they're applied.

18 THE COURT: So what kind of claims is it that you're
19 permitting them to assert?

20 MR. ROSENBAUM: In foreclosures, Your Honor?

21 THE COURT: Yes.

22 MR. ROSENBAUM: They can --

23 THE COURT: What about robo-signed documents where
24 they --

25 MR. ROSENBAUM: If that's --

RESIDENTIAL CAPITAL, LLC, ET AL.

72

1 THE COURT: -- claim --

2 MR. ROSENBAUM: If that's a defense to the -- that
3 would -- we would permit that, Your Honor. That would be a
4 defense to the foreclosure. If it's clearly seeking monetary
5 relief, the foreclosure's done, or it's not -- they're not
6 seeking to defend the foreclosure but they're just seeking
7 monetary --

8 THE COURT: So if they assert a TILA claim, they
9 assert that the note is not enforceable because you violated
10 the Truth In Lending Act and therefore you can't successfully
11 foreclose on the property. That's a permissible defense.

12 MR. ROSENBAUM: Yes, Your Honor.

13 THE COURT: What would the automatic stay continue to
14 bar if I grant this relief?

15 MR. ROSENBAUM: The automatic stay would continue to
16 bar claims that are solely for monetary relief, both in
17 foreclosure actions and bankruptcy. The automatic stay would
18 continue to bar any collective action or class action or
19 asserted class action. And literally, Your Honor, that is
20 about the limit. It would also continue to apply to set-offs.
21 There's not a --

22 THE COURT: What if the --

23 MR. ROSENBAUM: -- waiver of the set --

24 THE COURT: What if the TILA claim is asserted as a
25 set-off to a foreclosure action? And it may be state law

RESIDENTIAL CAPITAL, LLC, ET AL.

73

1 specific as to what defenses are permitted to be asserted, but
2 if someone claims that there's been a TILA or a RESPA violation
3 relating to the very specific loan that you're seeking to
4 foreclose on --

5 MR. ROSENBAUM: Your Honor, if it's a defense to the
6 foreclosure, the way we structured this -- and again, we
7 believe it's fair to both sides -- they're allowed to proceed
8 with that. They're allowed to proceed to a judgment. They
9 wouldn't have the ability to set that off against any claims
10 that the debtors may have. We believe that, as with all other
11 creditors, they should be similarly treated, and if they want
12 to assert set-off rights, you need to come to this Court.

13 We're trying to strike a balance between every other
14 creditor we have and the creditors or alleged creditors in
15 these actions.

16 THE COURT: Well, do you get a judgment -- I guess it
17 may be state-specific, but if it's a recourse loan and you
18 foreclose and there's a deficiency, do you get a deficiency
19 judgment against the borrower? You know, what about where they
20 claim, but I've got this TILA claim or RESPA claim that exceeds
21 that amount. Why aren't they entitled to --

22 MR. ROSENBAUM: Well, Your Honor, my understanding is
23 that, as a matter of practice, we're not pursuing those claims,
24 but to the extent we are, that would be, just under principles
25 of automatic stay, generally. I don't think that's a category

RESIDENTIAL CAPITAL, LLC, ET AL.

74

1 addressed in our order. It's something we could address.

2 THE COURT: But I think --

3 MR. ROSENBAUM: But we don't have the --

4 THE COURT: Part of the objections is the uncertainty
5 that's created, that lawyers don't know what it is they're
6 permitted to do in defending a foreclosure action in any state.
7 Okay. And it's the uncertainty, and I sympathize with them
8 about it. If these questions about well, if it's a state that
9 if you have a recourse loan and, as in most foreclosures,
10 there's a deficiency, you get a judgment. Can you enforce it?
11 Do they get to assert and set off a claim for TILA, RESPA,
12 state law fraud, you name it? Why is that you get a judgment
13 and you say oh, but you can't set off your claim against it?

14 You only want to try it once. If a state court's
15 going to try it and if it's going to result in a judgment
16 against a borrower, and their lawyer is saying but you're
17 keeping one or both hands tied behind my back because it's
18 going to result in a monetary judgment against my client, my
19 response to it is this very same loan has violated state law,
20 it has violated federal law. Why aren't they entitled to set
21 off if you're going to get a judgment, as opposed -- just a
22 foreclosure judgment allowing you to foreclose on the property?

23 MR. ROSENBAUM: Well, Your Honor, we have some concern
24 with waiving a fundamental bankruptcy right nationwide. We
25 clearly have no -- and we wouldn't be prosecuting any action as

RESIDENTIAL CAPITAL, LLC, ET AL.

75

1 plaintiff, including deficiency actions. Again, I don't
2 believe it's the policy to do so. However, if we were to
3 pursue those actions then clearly the defendant would be able
4 to bring any claim they have in a defense. And that, I think,
5 should be part -- the concern we have --

6 THE COURT: How do you separate set-off from that?

7 MR. ROSENBAUM: But the concern we have, Your Honor,
8 is we have to be cognizant and conscious of our claims
9 resolution process and where that's going to take place. And
10 we've looked at these issues, and we see that as very unwieldy,
11 unworkable, and will have courts, state courts, federal courts,
12 bankruptcy courts literally 6 -- we have 60,000 bankruptcies
13 pending, 50 --

14 THE COURT: Look, I'm not going to -- let me make it
15 clear before anybody else gets up here. I'm not going to leave
16 it to judges, bankruptcy judges or state court judges to decide
17 whether the stay ought to be reinstated or not. I mean, that's
18 all -- to the extent there's a stay, the only person who's
19 going to lift the stay is me.

20 MR. ROSENBAUM: Thank you, Your Honor. We have looked
21 and considered these issues and the precise issues Your Honor
22 is raising. And the concern that the debtors have is we need
23 to maintain control over the claims resolution process.

24 THE COURT: My biggest problem is an issue of clarity.
25 Is it clear what a borrower, whose home is being foreclosed or

RESIDENTIAL CAPITAL, LLC, ET AL.

76

1 against whom an eviction proceeding is being brought, can and
2 can't do. Are they going to run the risk of contempt if their
3 lawyer takes an action in state court?

4 Have you tried to confer -- I know you did with the
5 committee and U.S. Trustee, but have you met with NACBA, for
6 example? I'm not saying they have standing here or don't have
7 standing here.

8 MR. ROSENBAUM: We --

9 THE COURT: But have you attempted to --

10 MR. ROSENBAUM: We did not --

11 THE COURT: -- resolve this issue --

12 MR. ROSENBAUM: We actually did not meet with NACBA,
13 but we have -- we did meet with the Association or had
14 discussions and communication with -- the name will escape me.
15 Your Honor's probably more familiar, but the Association of
16 Chapter 13 Trustees. And they were --

17 THE COURT: They're not usually the ones bringing
18 these claims.

19 MR. ROSENBAUM: But they were -- they --

20 THE COURT: I mean, they stand -- my experience where
21 the Chapter 13 Trustee stood by and watched the fight go on.

22 MR. ROSENBAUM: Well, to finish my thought, they were
23 satisfied with the relief.

24 THE COURT: Well, that doesn't --

25 MR. ROSENBAUM: The other -- but the constituency we

RESIDENTIAL CAPITAL, LLC, ET AL.

77

1 did discuss with and deal with were the debtors' in-house
2 counsel that managed this litigation, and their communication
3 with external counsel, and what external counsel was hearing
4 from defense counsel and that we were hearing from defense
5 counsel. So this was an iterative process to get where we are.
6 We do believe it's clear.

7 I don't believe it's possible to have an order that's
8 going to address every single counter-claim or claim that a
9 party could bring in a foreclosure action. It will not be our
10 intent to waive the automatic stay and threaten contempt. We
11 will educate our external counsel, through our in-house
12 counsel, that we have to work with borrowers in these actions.

13 If it's our position that it's a stay violation or
14 that it's subject to the automatic stay and is not covered by
15 the order, their recourse is to come to this Court, like any
16 other creditor, and get relief. But we feel that we've gone
17 quite far in -- and again, I believe unprecedented in coming up
18 with a solution that protects the debtors, recognizes the
19 protection of the automatic stay to where it's applicable,
20 concern for the claims resolution process that we're going to
21 have to deal with in this case, but afford the fundamental
22 rights to both borrowers in foreclosures and bankruptcies. I
23 don't know if we can go any farther than not have the stay at
24 all. And I don't think that's appropriate and I don't think
25 that's warranted.

RESIDENTIAL CAPITAL, LLC, ET AL.

78

1 THE COURT: And I agree with that. Let me ask you a
2 couple of other questions. Does the automatic stay bar actions
3 for damages based on post-petition conduct by the debtor?

4 MR. ROSENBAUM: No, it doesn't, Your Honor.

5 THE COURT: Let me ask you specifically, the main
6 plaintiffs, who the matter is pending before the main Supreme
7 Court, I couldn't tell, have you been able to resolve that
8 issue?

9 MR. ROSENBAUM: Your Honor, we spoke to counsel and
10 that was agreed that was simply a motion for relief from the
11 stay. And --

12 THE COURT: Well, come on, you're asking me to modify
13 the stay. And the statute clearly -- I can do it on condition.
14 I don't want to have to do this twice. I mean, can't you
15 resolve this issue about the main --

16 MR. ROSENBAUM: May I -- just may I --

17 THE COURT: There's a matter pending in the main
18 Supreme Court.

19 MR. ROSENBAUM: I understand, Your Honor.

20 THE COURT: It's fully briefed. It's awaiting
21 decision. Have you tried to resolve this issue? Now don't
22 tell me that they have -- because they have filed a motion to
23 lift the stay now with respect to that.

24 MR. ROSENBAUM: I'm happy to address that, Your Honor,
25 if --

RESIDENTIAL CAPITAL, LLC, ET AL.

79

1 THE COURT: Go ahead.

2 MR. ROSENBAUM: -- you give me a chance. Not an
3 excuse, but a lot of people in this room are very busy, and
4 we're very busy getting to this date.

5 THE COURT: I am, too.

6 MR. ROSENBAUM: And --

7 THE COURT: And I read all these papers.

8 MR. ROSENBAUM: I understand that, Your Honor.

9 THE COURT: And I'm trying to resolve it now so that I
10 don't have to do it again.

11 MR. ROSENBAUM: Just give me a chance. What we told
12 counsel for the main plaintiffs is we'd appreciate it, we
13 believe it's an automatic stay motion, have it on for the July
14 10th hearing, which was, I think --

15 THE COURT: Not July 10th; the 18th is the next
16 hearing.

17 MR. ROSENBAUM: -- July 18th. After today --
18 literally after today, this week we will look at the issue and
19 address it because it's not just the main plaintiffs, Your
20 Honor. There's litigation throughout the country. There's a
21 couple of appeals at the Fourth Circuit that are held up. Our
22 position is that those courts -- at this point these are
23 substantive decisions that have been briefed but they don't
24 have the opportunity to issue them if -- and we had to take
25 that position. If Your Honor's saying let's be clear, if

RESIDENTIAL CAPITAL, LLC, ET AL.

80

1 anything's been fully brief and pending, issue the decision --

2 THE COURT: I'm not saying that. The only thing I've
3 read about so far is the main action.

4 MR. ROSENBAUM: But the reason that we're hesitating
5 on the main action and we need to think about it carefully is
6 it's not just the main action. And if we need -- if we feel
7 after reviewing the main action there's other things, I'm sure,
8 percolating through the circuits -- I think the Fourth Circuit
9 decision, I think it was the Gilbert case is apparently a
10 minority view in one of the circuits.

11 We need to be careful and look at this in the context
12 of our bankruptcy as to where we're applying the automatic stay
13 and where we're not. And to lift the automatic stay to allow a
14 circuit court to issue its opinion, reversing the lower court,
15 that puts us back into the -- ideally it would put us back into
16 the trial. If that's -- again, we're waiving the protection of
17 the automatic stay.

18 THE COURT: Look, I don't -- at some point those
19 issues are going to get resolved. I don't -- and they're not
20 going to get resolved by me, okay? If a matter has been fully
21 litigated, if it's on appeal and it's awaiting decision by an
22 appellate court, you're not really thinking you're going to get
23 me to say nope, I'm not going to allow the main Supreme Court
24 to decide the issue, I'm going to decide. That isn't going to
25 happen --

RESIDENTIAL CAPITAL, LLC, ET AL.

81

1 MR. ROSENBAUM: I understand that, Your Honor.

2 THE COURT: -- and I think you know that. Okay. And
3 where it isn't a question of -- particularly in the main, it's
4 not a question of a judgment having been entered and it
5 isn't -- and even there, I mean, oftentimes bankruptcy judges
6 lift the stay to permit state court litigation to go forward
7 for everything other than execution of the judgment, and that
8 isn't even -- it isn't even that far.

9 Okay, let me hear from other counsel with respect
10 to --

11 MR. ROSENBAUM: Your Honor, can I --

12 THE COURT: You want to -- go ahead.

13 MR. ROSENBAUM: Can I just -- the final point?

14 THE COURT: Go ahead.

15 MR. ROSENBAUM: Because really we are having these
16 discussions internally with our counsel, external counsel that
17 are handling those matters. And we have other concerns here
18 about -- we have obligations under our DIP loan, we have
19 obligations under our asset purchase agreement about where we
20 consensually lift the stay for matters that affect servicing
21 that have nationwide consequences for other mortgage loan
22 servicers.

23 So it's a larger issue in the context of these cases.
24 What we have been discussing, and decisions haven't been made
25 yet, if it makes sense -- for example this Fourth Circuit

RESIDENTIAL CAPITAL, LLC, ET AL.

82

1 litigation --

2 THE COURT: I don't know what the Fourth Circuit held,
3 but --

4 MR. ROSENBAUM: I won't belabor the details, Your
5 Honor. The point is if there's litigation out there, we're not
6 looking to come in and have fights about stay relief such as
7 the main. If it makes sense to go forward and let that court
8 rule and the other side is amenable to stipulated relief from
9 the stay that's going to allow these courts to issue those
10 decisions, that's probably going to be acceptable to us. As
11 you said, Your Honor, you're not going to rule; they have to
12 make -- these courts have to rule. And in some instances they
13 may rule anyway because there's other -- they're consolidated
14 actions.

15 But the issue is are those plaintiffs or defendants in
16 those actions then going to be satisfied with just stipulated
17 stay relief or do they want, depending on the result of the
18 appeal, to come back into court and start litigating these
19 things, in which case we're losing the protection of the
20 automatic stay. So we're trying to be systematic and careful
21 of how we review these things.

22 THE COURT: All right. Let me hear from other
23 counsel, first in the courtroom.

24 MR. AMINI: Thank you, Your Honor. Bijan Amini on
25 behalf of NACBA as well as one of -- the counsel in North

RESIDENTIAL CAPITAL, LLC, ET AL.

83

1 Carolina as well as two homeowners, William and Crystal
2 Johnson.

3 I think Your Honor is sensitive to -- there are two
4 issues; there's a substantive issue and then there's a
5 procedural issue. And I heard Your Honor's questions about the
6 procedural issues.

7 This order -- the debtor wants to remain a debtor-in-
8 possession and operate in the ordinary course as a debtor-in-
9 possession but he doesn't want to --

10 THE COURT: Well, look the debtor doesn't have to
11 agree to lift the automatic stay, and if they don't, I mean,
12 people can make motions to lift the automatic stay and I'll
13 rule upon them as they occur.

14 This case has already been unusual. The debtor has
15 taken a lot of steps, it seems to me, to try and continue
16 business as usual, to give up the protection of the automatic
17 stay in certain defined areas. It seems to me that they've
18 done a pretty good job in defining what they're proposing to
19 do.

20 The issue I'm really focusing on is -- some of it
21 raised in your objection and in others, and some based on my
22 own experience in other cases is does it appropriately deal
23 with the kinds of issues that come up.

24 MR. AMINI: Well, you have --

25 THE COURT: Are lawyers out in the field, have their

RESIDENTIAL CAPITAL, LLC, ET AL.

84

1 hands tied behind their back because they don't know what they
2 can do, what they can't do?

3 MR. AMINI: Well, according to the debtors' papers
4 there are 51,000 of these cases in the bankruptcy courts
5 pending as we speak. And --

6 THE COURT: And the one thing I assure you is the 300
7 and some odd bankruptcy judges around the country are not going
8 to get to decide whether the automatic stay in this case
9 applies or doesn't. Only I am going to do that.

10 MR. AMINI: I understand that, but the order that --

11 THE COURT: Because you asked just the opposite.

12 MR. AMINI: I understand that, and I came with perhaps
13 a modified proposal to present to Your Honor on that issue,
14 understanding the concern that would arise because of that.
15 But even before we get to that issue, the order that you're
16 entering now is an order -- and I could go through it with you,
17 and in fact I'd be happy to go through it with you, but it's
18 subject to many different interpretations.

19 By way of just a simple example, you asked debtors'
20 counsel post-petition actions, are they subject to the
21 automatic stay? Answer: no. The order, as written, cannot
22 bring, under any circumstances any action -- and they raise it
23 as direct claim, counter-claim, motion, adversary proceeding; I
24 don't know how they got that category of four things; I assume
25 in all our bankruptcy courts and state courts there are other

RESIDENTIAL CAPITAL, LLC, ET AL.

85

1 procedures too, but I guess we're precluded from using those --
2 but in any event, for monetary relief of any kind or any nature
3 against the debtor. Debtor includes debtor-in-possession, by
4 definition.

5 So if the debtor-in-possession goes to one of these
6 courts, violates Rule 3000.21. A state court rule on fee
7 assessments and when you have to tell the individual consumers
8 how much you're charging them in fees and how much time you
9 have for notice, and then if you charge them the fees anyway
10 you're entitled to attorney's fees. Absolutely not. It's
11 prohibited. These guys are getting -- at this point the debtor
12 would get a special deal which no other service provider has
13 that says I get to drive the truck --

14 THE COURT: To the contrary, because any other service
15 provider the automatic stay simply applies. Good luck, you
16 know?

17 MR. AMINI: The other service providers are not in
18 bankruptcy. I'm talking about a non -- but anyway, basically
19 the debtor is saying I'm going to drive my trucks on the road
20 and if you catch me speeding, tough, you can't give me a
21 ticket.

22 THE COURT: That's not a fair argument.

23 MR. AMINI: But it is -- it is --

24 THE COURT: It's not a fair argument.

25 MR. AMINI: It is with respect to, for example --

RESIDENTIAL CAPITAL, LLC, ET AL.

86

1 THE COURT: Well, bankruptcy has an automatic stay and
2 it applies. The question is the debtor has asked to lift it in
3 certain respects. You think it should go further.

4 MR. AMINI: Well, we made a proposal to them. It was
5 a simple proposal, one that would require less parsing through
6 the order to try to fig -- Your Honor raised an interesting
7 question. I mean, Your Honor understands how these work. An
8 aggressive lawyer in Montana somewhere, pushing the case for
9 his client, comes up with some claim that he thinks might work
10 as a set-off to this. You know, they're going to get a call
11 from the other side, you're in violation of the automatic stay,
12 I'm going to haul you before Judge Glenn in New York City and
13 you're going to be in a lot of trouble sitting out here in
14 Montana doing this. I mean, this guy's getting paid what, 500
15 dollars to try to defend a family from losing their home and
16 now he's got to sit around and think, okay, I have all the
17 stuff that I know about here in Montana but I also have to sit
18 down, read this order and try to understand am I limited, for
19 example to the six different types of defenses I can raise --
20 methods of defending this claim that I can raise here.

21 I mean, it seems to me a much more simple of version
22 of this is, you know, you want to continue being a mortgage
23 service provider, you can go forward, subject to all of the
24 same rules, with the exception that, as Your Honor said, you
25 can't enforce a money judgment against them at this point. No

RESIDENTIAL CAPITAL, LLC, ET AL.

87

1 court can. That's the automatic stay.

2 To the extent that the debtor feels that some attorney
3 is getting beyond the bounds of what has been agreed to,
4 shouldn't it be the obligation, if they want to continue
5 business as usual, to come to you and ask for a stay in that
6 particular instance and perhaps give the consumer and their
7 counsel an opportunity to be heard remotely rather than calling
8 51,000 -- I doubt we'll have problems with 51,000, but if you
9 think about it, just a two percent problem rate will give you
10 1,000 cases in this court of people having to come from around
11 the country to argue about their specific individual cases.
12 And what are we telling the judges? How are they going to
13 determine whether the people that filed them are violating your
14 order or not? They're going to have to interpret your order as
15 well.

16 And I could -- as I say, if you go through --
17 paragraph 12 of the order is the one that we find problematic.
18 And if you go through it, just 12(a) defines the types of
19 things people can do --

20 THE COURT: Okay. Any other points you have?

21 Anybody else want to be heard?

22 Does anybody on the phone want to be heard?

23 MS. NORA: Your Honor, Wendy Alison Nora. I
24 essentially concur with NACBA --

25 THE COURT: Anybody else want to be --

RESIDENTIAL CAPITAL, LLC, ET AL.

88

1 MR. AMINI: -- and I did -- I appreciated the Court
2 pointing out RESPA and TILA, but there's also but there's also
3 Fair Debt Collections Practices Act; these are offsets, actual
4 treatises available.

5 What will happen is that with this stay being parsed
6 the way that it is, the homeowners are going to have more
7 difficulty getting lawyers, and lawyers are going to have more
8 difficulty pursuing their clients' defenses.

9 MR. AMINI: May I add one thing only, Your Honor?

10 THE COURT: Very quickly.

11 MR. AMINI: We were very happy -- we were very
12 prepared to sit down. I mean, there's been a lot -- there's
13 the time pressures --

14 THE COURT: That I don't want to hear about because
15 I'm going to -- that's one thing you're going to get. I'm not
16 ruling on the motion today.

17 MR. AMINI: Prepared to sit with them.

18 THE COURT: I'm going to direct that there be further
19 discussion.

20 Anybody else wish to be heard with respect to the
21 supplemental servicing motion?

22 All right.

23 MR. ROSENBAUM: May I just respond --

24 THE COURT: Go ahead, Mr. Eckstein.

25 MR. ROSENBAUM: -- briefly?

RESIDENTIAL CAPITAL, LLC, ET AL.

89

1 THE COURT: Mr. Eckstein.

2 MR. ECKSTEIN: Sorry. Your Honor, I just wanted to
3 raise one item that was really separate from what was being
4 discussed. And with respect to what's being discussed, the
5 committee would also be certainly available and amenable to
6 participate in any discussions with respect to the precise
7 scope of the stay. We think it's an important issue and we
8 think it does deserve careful attention and we endorse the
9 notion of continuing beyond today to come up with a proper
10 solution.

11 One item that I wanted to refer to Your Honor, which
12 was separate from the issue of modification of the stay, there
13 was a provision in this motion dealing with the ongoing
14 performance by the debtor of its obligations under various
15 agreements with the trusts. And we have agreed with the debtor
16 that that issue will be reserved for further consideration on
17 July 10th, and the committee reserves its right to file a
18 supplemental pleading with respect to the issues raised in that
19 aspect of the motion in the proposed order.

20 THE COURT: What's your view about how quickly this
21 supplemental servicing motion needs to get resolved?

22 MR. ECKSTEIN: Your Honor, we believe that this could
23 be dealt with on July 10th.

24 MR. ROSENBAUM: Your Honor, may I be heard?

25 THE COURT: Yes.

RESIDENTIAL CAPITAL, LLC, ET AL.

90

1 MR. ROSENBAUM: Just two points on the objection.

2 One, there's clearly no intent or desire on the part of the
3 debtors to start waving the threat of contempt against any
4 borrower when it comes to -- in a bankruptcy or foreclosure or
5 in any other action -- when it comes to try to figure out what
6 their rights are. That's simply just not well taken.

7 Secondly, I think there also has to be some concern
8 here that we're now broadcasting to the debtors of the world
9 and parties in foreclosure that now you can -- you're
10 reinvigorated to bring --

11 THE COURT: If you think that plaintiffs' lawyers
12 around the country haven't painted a big target on your back,
13 you're mistaken. Okay? That's the reality of it.

14 MR. ROSENBAUM: Granted, Your Honor. This is why we
15 have, also, some concerns with the formulation that NACBA is
16 raising, which is no stay relief whatsoever.

17 THE COURT: Okay. Let me make clear. The NACBA
18 proposal isn't going to fly with the Court. My concern is
19 this. I think that the debtor, and to the extent the committee
20 was involved or the U.S. -- I don't know whether the U.S.
21 Trustee's been involved in this issue or not. I mean, I think
22 in large measure what you've proposed is acceptable. The
23 problem I have is when I started thinking it through, from my
24 own experience about the kinds of claims that I've seen
25 asserted by borrowers, it left question marks in my mind as to

RESIDENTIAL CAPITAL, LLC, ET AL.

91

1 what a lawyer could do and what he can't do. Yes, a lawyer can
2 always come here and ask to have the stay lifted to proceed. I
3 think you've largely tried to limit the instances where that
4 has to occur, and I commend you for that. I think that it may
5 be 100 percent of what you've done will ultimately be
6 acceptable to the Court, and it may be that only ninety percent
7 of it will be. But what I want, we're going to -- can this
8 matter -- will it wait till July 10th?

9 MR. ROSENBAUM: Well, Your Honor, may I just address
10 what the other issue was with the committee? Based on the
11 other components of this motion, not really specifically the
12 relief for the foreclosures and bankruptcies but the settlement
13 parameters, the committee requested that as to the committee
14 this be an interim order and Your Honor would hear it on a
15 final basis on the 10th. It is very, very important that at
16 least this ninety percent relief be communicated really
17 yesterday, but today, because we've been telling counsel that
18 have these questions, not guaranteeing them that Your Honor's
19 entering this order, but this was teed up for today and we
20 would try to get clarity in bankruptcies. And there is some
21 confusion in nonforeclosures --

22 THE COURT: Let me just stop you because I thought
23 that the settlement portion of this motion -- and I haven't
24 heard any arguments -- any objections specifically to that,
25 seemed to me to be well taken. So I have no problem -- and I

RESIDENTIAL CAPITAL, LLC, ET AL.

92

1 do want to see whether there are specific objections to the
2 settlement component. I frankly, would think that plaintiffs
3 largely would be very happy to have that in place, to know that
4 they could go ahead and try and resolve these issues. I have
5 no problem about trying to carve out that piece of it and
6 entering an order promptly with respect to that.

7 Are there other remarks? And I'll ask whether there
8 are others to be heard specifically on that. That wasn't the
9 part, obviously, where I focused --

10 MR. ROSENBAUM: No, no --

11 THE COURT: -- my attention --

12 MR. ROSENBAUM: I --

13 THE COURT: -- because I didn't have -- I thought that
14 that made a lot of sense.

15 MR. ROSENBAUM: I was just trying to explain the
16 situation. Our point is -- with respect to the relief we've
17 been discussing is, if anything, we'd like to get that on an
18 interim. If we're going to -- it seems --

19 THE COURT: You're talking about the settlement
20 procedure.

21 MR. ROSENBAUM: -- that this will only get more
22 expanded.

23 THE COURT: The settlement procedure on an interim
24 basis?

25 MR. ROSENBAUM: No, the relief on the automatic stay,

RESIDENTIAL CAPITAL, LLC, ET AL.

93

1 at least on an interim basis, just because at this point it's
2 hard for us to -- since we don't have the express provisions
3 granting the relief in the bankruptcy cases, and really more to
4 the point, in the nonjudicial foreclosures, there's -- things
5 are slowing down, which isn't good for either side.

6 THE COURT: Let me hear from other counsel about
7 whether this should be entered on an interim -- the whole order
8 should be entered on an interim basis, subject to being
9 revisited on July 10th.

10 Mr. Eckstein?

11 MR. ECKSTEIN: Your Honor, the committee had made
12 certain modifications with respect to caps that were built into
13 the order, but with those modifications, we felt that it made
14 sense for the order to be entered on that basis.

15 THE COURT: All right.

16 MR. ECKSTEIN: And we thought that the relief on an
17 interim basis was appropriate and useful and that we could deal
18 with it on a final basis in July.

19 THE COURT: Let me hear from NACBA's counsel.

20 MR. AMINI: It's --

21 THE COURT: I mean, I think we ought to try and keep
22 the trains moving.

23 MR. AMINI: I don't have a problem with that. But in
24 simple terms -- and I'll work quickly with them and get back to
25 you even faster than July 10th or 18th. I have lost track of

RESIDENTIAL CAPITAL, LLC, ET AL.

94

1 which day it is that we're supposed to come back here. But it
2 doesn't change the infirmities and the concerns you have and
3 that we have with respect to it --

4 THE COURT: Well, it does to this extent: I think in
5 the vast majority of cases the answers are going to be clear to
6 lawyers out in the field who are representing borrowers. And
7 where it's not clear, that's where a final hearing -- which I
8 think will be on July 10th; the June 18th hearing is just too
9 full, I can't put anything else on for that. And we're going
10 to want to talk about whether anything gets moved off of that.
11 But -- so the issue is whether you can -- whether everybody can
12 live with this order on an interim basis. I'm making it clear.
13 There's no -- it's without prejudice to anybody's rights. I'll
14 tell you right now, though, I think that -- I thought that
15 ninety percent of what's in there I had no problem with, on an
16 interim or a final basis. It was at the margins where I
17 thought that there was uncertainty that might get resolved if
18 people actually sat down at the table and tried to do it.

19 MR. AMINI: At least to the extent that you're going
20 to enter this order, and it appears that you are on --

21 THE COURT: No. Don't assume that yet.

22 MR. AMINI: -- on an interim basis till July 10th --

23 THE COURT: July 10th.

24 MR. AMINI: -- I would ask that at least there be some
25 protection for the attorneys who are seeking to --

RESIDENTIAL CAPITAL, LLC, ET AL.

95

1 THE COURT: Pay your money, take your chances. I
2 can't --

3 MR. AMINI: Yeah. Yeah.

4 THE COURT: The order is the order. People have to
5 read the order and judge whether they think they're safe in
6 taking whatever action they can, or if they're going to come
7 back with a motion to lift the stay. But I think if people
8 have waited this long, they can wait till July 10th.

9 MR. AMINI: Well, then I think from that perspective
10 the infirmities are what they are.

11 THE COURT: Okay.

12 MR. AMINI: And we would object to entering it until
13 such time as it's been resolved. Thank you.

14 THE COURT: All right. Anybody else want to be heard?
15 Why do you need more than the settlement portion of
16 this order now?

17 MR. ROSENBAUM: So we can communicate -- the position
18 as set forth in this motion is this is critical relief to
19 foreclosures and bankruptcies nationwide. The prior relief
20 clearly did not go far enough, and that's a big problem. A
21 very big problem. And it is slowing down -- in some cases,
22 cases probably aren't progressing really because of our concern
23 that we don't really -- the debtors don't have the authority to
24 continue these actions and are actually -- would be dragging
25 defense counsel into situations that would be unfair.

RESIDENTIAL CAPITAL, LLC, ET AL.

96

1 So there's a reluctance on our external counsel to do
2 what they are supposed to be doing as part of our servicing
3 obligations. So I would say that the ninety percent for a
4 short period, because we can commit to work with whoever's
5 interested in this, to come up with more clarity between now
6 and July 10th, but I think it's only going to get more
7 expansive. And the relief we have, I think, will go a very
8 long way to satisfying defense counsel as well as our external
9 counsel of what the parameters are and allow these actions to
10 go forward.

11 We can report to them or include as part of this
12 order, that comfort -- that it's an interim order; there may be
13 more clarity in a July 10th order. And during that interval we
14 have no intention and will not seek sanctions against any
15 party. We reserve our rights in those actions that we felt it
16 necessary, but we wouldn't take any type of action prior --

17 THE COURT: You may get real mad, but you won't seek
18 sanctions yet.

19 MR. ROSENBAUM: That's right. Not until the 10th.

20 THE COURT: Mr. Masumoto, does the U.S. Trustee have a
21 position on this?

22 MR. MASUMOTO: We do not, Your Honor, at this time.

23 THE COURT: All right. I'm going to approve the order
24 on an interim basis with all parties reserving all rights. I
25 direct that debtors' counsel, creditors' committee counsel --

RESIDENTIAL CAPITAL, LLC, ET AL.

97

1 and I really would ask the U.S. Trustee to participate on this.

2 I think you've got considerable experience that deals with
3 foreclosure crisis. And obviously NACBA's counsel and other
4 counsel who want to do that.

5 I want any additional filings relating to this by 5
6 p.m. Friday, June 29th. I don't want anybody spending Fourth
7 of July holiday dealing with this, so let's get it done before
8 then. And it may be at the end of the day that this order is
9 going to be entered on a final basis; I'll decide that. So no
10 one should assume from my comments that I'm not prepared to
11 enter this order on a final basis. I thought that there are --
12 it could use some clarity in some areas, but it may not be the
13 clarity that NACBA wants because I will agree with at the end
14 of the day.

15 MR. ROSENBAUM: Thank you, Your Honor.

16 THE COURT: All right. All right, is that it for our
17 agenda?

18 MR. NASHELSKY: Yes, Your Honor. That's everything
19 for the agenda for the 12th.

20 THE COURT: Okay. Now, let's just very briefly before
21 we adjourn. I'm concerned about what's on the calendar for
22 June 18th. Do you have a better handle at this point about
23 which of the motions that are on the 18th are going to require
24 evidentiary hearings?

25 MR. NASHELSKY: I think, Your Honor, the sale

RESIDENTIAL CAPITAL, LLC, ET AL.

98

1 procedures -- clearly.

2 THE COURT: You know, on 360 Bankruptcy this morning
3 I'm sure I read what everybody else read. It sounds like
4 Berkshire Hathaway has come forward with a new offer for both
5 portions. I don't know whether the debtors intend to actively
6 negotiate with Berkshire Hathaway, whether you're going forward
7 with the sale procedure motion and stalking horse contracts in
8 the face of potentially higher bids. I'm sure the creditors'
9 committee is going to have something to say about it.

10 MR. NASHELSKY: Yeah. I think we're going to regroup
11 after today, Your Honor, sit down and figure out next steps.
12 Obviously, we'll be talking to Berkshire and we'll be talking
13 to our existing stalking horse bidders and the committee about
14 what are the right steps for Monday.

15 MR. ECKSTEIN: If I may, Your Honor, just to add
16 confusion. There was another bid by another entity; Lone Star
17 also submitted a bid for one of the groups of assets. Just to
18 make sure we have the full complement.

19 THE COURT: Okay. Thank you.

20 MR. NASHELSKY: Showing that our stalking horses did a
21 very nice job on their asset purchase agreements, since
22 everybody just signed up to them.

23 THE COURT: Everybody would like that breakup fee,
24 too. No, except for Berkshire Hathaway, which is willing to
25 take a lot less and no expense reimbursement.

RESIDENTIAL CAPITAL, LLC, ET AL.

99

1 MR. NASHELSKY: I think there are -- I think it is
2 critical that we move forward on the financing motions. I
3 don't think there is a lot on those. I think the issues are
4 pretty narrow. That's the --

5 THE COURT: Where do you see the issues -- factual
6 issues in the financing motion?

7 MR. NASHELSKY: I'll let Mr. Goren, who's handling
8 those motions, just respond.

9 MR. GOREN: Thank you, Your Honor. Todd Goren,
10 Morrison & Foerster on behalf of the debtors.

11 I think the factual issues with respect to the
12 financing motions are fairly limited. I think the committee
13 has raised an issue with respect to the fees and with respect
14 to certain amendments that they believe are needed. I think
15 there will be some limited declarations that we'll probably put
16 in on those points. I don't know if the committee feels it
17 necessary to actually engage in a cross-examination of Mr.
18 Puntus, who they deposed earlier last week on those points.

19 I'm very hopeful that we'll be able to resolve or
20 substantially narrow the issues that the committee and other
21 parties have raised by Monday. But --

22 THE COURT: So you think you're going to have one
23 witness in a declaration?

24 MR. GOREN: Yeah. I think we would probably be able
25 to limit ourselves to -- I mean, Mr. Whitlinger had some

RESIDENTIAL CAPITAL, LLC, ET AL.

100

1 previous testimony; I don't think there's anything he said in
2 his initial declaration that is really at issue. I think to
3 the extent we had a witness it would be limited to Mr. Puntus.

4 THE COURT: Mr. Eckstein?

5 MR. ECKSTEIN: Your Honor, I'm trying to
6 prognosticate. I'm being a little bit cautious, but I think I
7 can say today that the DIP and cash collateral motion has a
8 much higher likelihood of resolution or significant narrowing.
9 We have made good progress already with respect to that motion,
10 and I am guardedly optimistic that between now and Monday we
11 actually could resolve the issues or limit it to very, very few
12 open issues with respect to the DIP cash collateral.

13 Our intention is to file a declaration by the
14 committee's financial advisor in support of our objection. I
15 don't know at this point that we'll need an evidentiary hearing
16 beyond the two declarations that will be on the file.

17 THE COURT: When are you going to be filing the
18 declaration?

19 MR. ECKSTEIN: That's being filed Wednesday, Your
20 Honor. And so with respect to the DIP and cash collateral, to
21 the extent there is going to be an evidentiary hearing, I would
22 expect that it would be brief and narrow. And as I said, we
23 may be able to avoid it.

24 THE COURT: Are you going to take -- are you taking
25 any depositions on it?

RESIDENTIAL CAPITAL, LLC, ET AL.

101

1 MR. ECKSTEIN: We've taken the deposition already,
2 Your Honor.

3 THE COURT: Taken. Are they going to want to take a
4 deposition of your financial advisor?

5 MR. ECKSTEIN: We've made our FA available this
6 Friday.

7 THE COURT: Okay.

8 MR. ECKSTEIN: With respect to the servicing motion, I
9 would agree with Mr. Nashelsky; right now that is extremely
10 fluid.

11 THE COURT: I'm sorry, is what?

12 MR. ECKSTEIN: That is extremely fluid. A lot of -- a
13 lot of new material was filed at the end of the day yesterday.
14 And neither the debtor nor the committee, I believe, had
15 adequate opportunity to evaluate the implications and what
16 people are going to do about it.

17 THE COURT: Just tell me which motion?

18 MR. ECKSTEIN: The sale procedures, Your Honor.

19 THE COURT: The sale procedures.

20 MR. ECKSTEIN: I'm sorry.

21 THE COURT: Yeah. That's why I --

22 MR. ECKSTEIN: I said servicing, I misspoke. I
23 misspoke, I'm sorry. The sale procedures.

24 A lot of new information, as Your Honor has noted, was
25 filed yesterday. And I think that's going to take some

RESIDENTIAL CAPITAL, LLC, ET AL.

102

1 discussion. I would expect that the committee and the debtor
2 will be consulting; we'll have to obviously consult with our
3 respective clients. And we probably could be in a position to
4 give the Court an update by tomorrow or latest Thursday, I
5 would think, on how that's proceeding. But I obviously would
6 need to hear from the debtor on what their intentions are.

7 THE COURT: Any other motions that are going to
8 require an evidentiary hearing?

9 MR. ECKSTEIN: I don't believe there are any other
10 motions that we would expect an evidentiary hearing for next
11 Monday. I know there's -- excuse me, Your Honor. If I may,
12 just one second.

13 THE COURT: Go ahead.

14 MR. ECKSTEIN: Your Honor, there's still -- with
15 respect to the origination motion and the Ally servicing motion
16 there are still some significant information requests that are
17 pending with the debtor, and we haven't yet gotten resolution
18 on that. So I don't know where that will stand exactly, and
19 we'll need to assess tomorrow or the next day exactly where
20 that stands. So I don't know exactly where we'll be with
21 respect to that motion.

22 THE COURT: Refresh me whether -- is the time schedule
23 relating to the sale? How is that linked to the DIP and cash
24 collateral motion?

25 MR. ECKSTEIN: Your Honor, the DIP -- I believe, and

RESIDENTIAL CAPITAL, LLC, ET AL.

103

1 the debtor obviously can speak to it. But I believe the debtor
2 is anxious to have the DIP order entered. I don't recall what
3 the outside date is, but I believe that they've given
4 themselves a relatively tight timetable to get the order
5 entered promptly.

6 The sale has separate deadlines in the Nationstar
7 transaction to have a final order approved; I believe it's
8 shortly after the 18th. I would imagine that that's going to
9 be something that has to get discussed with Nationstar, in
10 terms of whether or not there's any flexibility on the entry of
11 that order, and that discussion hasn't taken place. And so one
12 of the important questions is whether there's going to be any
13 flexibility on the entry of a final order --

14 THE COURT: Well, let me --

15 MR. ECKSTEIN: -- with respect to the sale procedures.

16 THE COURT: And I had a full plate for today and on
17 some other matters this week, so I haven't studied the DIP and
18 sale motions for next week. I get very concerned, particularly
19 if there are disputed factual issues on any of those, about
20 timelines that have been built in, because this happened in
21 other cases where DIP loans -- or I think that the time
22 schedule was dictated by the debtor who wanted to do a sale
23 very quickly and it wasn't necessarily lender-driven that those
24 tight time schedules have been built in. I don't know whether
25 that comment applies here or not.

RESIDENTIAL CAPITAL, LLC, ET AL.

104

1 This is an important case. These are important
2 issues. I want to make sure they're fully vetted -- and I know
3 it's a moving target because there are different additional
4 offers that are coming in. I don't want -- I want to make
5 clear -- this isn't directed at you, Mr. Eckstein. I don't
6 want artificial deadlines driving these very important
7 decisions with huge economic impact on this case as a whole.
8 That isn't an accusation or a charge against anybody; it's just
9 an overall comment. I'll decide things when they need to get
10 decided, but I'm concerned about the evidentiary hearing on
11 Monday.

12 Let me make clear to everybody. For any matter that
13 requires an evidentiary hearing on Monday, this Friday at noon
14 is an absolute deadline for the parties to submit written
15 declarations. If there are depositions and you're relying on
16 deposition designations, the designations and counter-
17 designations. Exhibits pre-marked; they're the debtors'
18 motions so the debtors use the numbers; the objectors use
19 letters. Everything -- we don't have a reporter who marks
20 things, so everything needs to be pre-marked. You need to get
21 three copies of all exhibits delivered to chambers by Friday at
22 noon. I want everything here if we're going forward with
23 evidentiary hearings.

24 I understand you're probably going to wind up spending
25 the weekend trying to resolve things, and I encourage you all

RESIDENTIAL CAPITAL, LLC, ET AL.

105

1 to do that. But when I take the bench for this hearing on the
2 18th, I expect to be prepared. Okay, I can't do that if I
3 don't have papers. I know for today's hearing people asked for
4 some deadlines to be moved and I tried to be accommodating
5 about that, but I'm very protective of the Court's time to
6 review materials. This is already much shorter than I like.

7 MR. ECKSTEIN: Your Honor, I think -- at least,
8 speaking from the committee's standpoint, I'm sure the debtor
9 will speak -- that is understood. And it seems eminently
10 reasonable in terms of --

11 THE COURT: How many protagonists are there on the
12 sale procedure and financing motions?

13 MR. ECKSTEIN: Your Honor, I believe as a practical
14 matter, the essential issues of the sale procedures are largely
15 the subject of the committee's objection and the debtors'
16 motion.

17 THE COURT: Well, the U.S. Trustee's filed an
18 objection, too.

19 MR. ECKSTEIN: The U.S. Trustee has filed, and a
20 pleading was filed yesterday also by the four trustees that
21 raised an issue that is very important, but I think somewhat
22 tangential to some of the basic elements of the sale
23 procedures. There obviously are parties-in-interest who've now
24 filed significant pleadings that essentially reflect
25 alternative transactions or alternative proposals, so they're

RESIDENTIAL CAPITAL, LLC, ET AL.

106

1 important in that they've changed the landscape.

2 But I think that the sale procedures is a very
3 important motion, but the debtor and the committee are
4 dialoging pretty actively about that. And I think we'll have
5 to make a judgment as to whether or not that does or does not
6 require evidence. I would think right now -- I agree with Mr.
7 Nashelsky. I would assume on that motion if it's not adjourned
8 that it's going to require evidence.

9 THE COURT: Okay.

10 MR. ECKSTEIN: The other motion I just wanted to speak
11 to, there is an examiner motion that is also on the calendar.

12 THE COURT: Oh, yes. I've been reading about that.
13 Yes.

14 MR. ECKSTEIN: And that seems to also be on the
15 calendar for the 18th.

16 THE COURT: It does.

17 MR. ECKSTEIN: And --

18 THE COURT: How can I forget?

19 MR. ECKSTEIN: We are not assuming that there is an
20 evidentiary hearing on that. And I don't know whether Your
21 Honor intends to really hear that on the 18th.

22 THE COURT: I do.

23 MR. ECKSTEIN: But that is on, and that is contested.

24 THE COURT: Tell me what the -- I did sign the ex
25 parte order for the 2004 examination. I did it; I knew that

RESIDENTIAL CAPITAL, LLC, ET AL.

107

1 the examiner motion had been filed. I'll tell you my thinking
2 when I signed that is if there's an examiner, the examiner is
3 going to need all those documents. So we may as well just go
4 forward with it, and let the committee set in motion getting
5 the documents.

6 I'm not previewing the examiner motion other than to
7 say if there is an examiner there aren't going to be two
8 unlimited budgets; namely, the examiner and the committee. And
9 I know that the committee in support of its 2004 and the order
10 was worked out, we didn't have to have a hearing about it --
11 was intending a very broad investigation of pre-petition
12 transactions. Those same arguments have been made in support
13 of the examiner motion. I think when I hear the examiner
14 motion on Monday I'm going to be very interested in hearing how
15 duplication should be avoided, and therefore unnecessary
16 expense and everything else. But I don't want to prejudge.

17 MR. ECKSTEIN: I know that Your Honor has a very full
18 plate, and I have no doubt that Your Honor will ultimately have
19 the opportunity to read both the committee's response and the
20 debtors' response. I think Your Honor will find them to be
21 very, very interesting and enlightening.

22 THE COURT: Yeah, I know the debtors' response. I
23 know a little bit about it already, so.

24 MR. ECKSTEIN: And I trust Your Honor will read the
25 committee's response as well.

RESIDENTIAL CAPITAL, LLC, ET AL.

108

1 THE COURT: I will.

2 MR. ECKSTEIN: And I think Your Honor will note
3 that -- I'm not aware that there was any pleading filed in
4 support of the examiner motion, which is an interesting point
5 as well, but nonetheless that'll be heard, I assume, by
6 argument on the 18th.

7 THE COURT: It will. Let me just say that Monday's
8 calendar has nothing but ResCap, and if necessary, plan to be
9 here as late as necessary. Okay. I've got this -- it's just
10 it's a very full week.

11 MR. NASHELSKY: We understand, Your Honor. We will do
12 everything we can to limit the issues for Monday. As Mr.
13 Eckstein said, we're in constant discussions on the cash
14 collateral and DIP, which we hope to narrow if not resolve.
15 Origination and subservicing we hope, again, to be able to
16 resolve with information and discussions. Sale procedures,
17 there's a lot going on, so I don't want to preview that at all
18 because --

19 THE COURT: Does it really need to -- well, we'll see
20 what happens on Monday.

21 MR. NASHELSKY: When I talk to my client, we have to
22 decide what all this means and what we should be -- what you're
23 doing. The examiner, we heard. So we understand, and we
24 appreciate Your Honor being available. And we will do our best
25 to limit the day's evidence as much as possible, and hopefully

RESIDENTIAL CAPITAL, LLC, ET AL.

109

1 resolve a bunch of these before.

2 Your Honor appeared popular with the wheel, which
3 was --

4 THE COURT: I'm sorry?

5 MR. NASHELSKY: Your Honor appeared popular with the
6 wheel, so it caused scheduling issues in terms of being very
7 busy.

8 THE COURT: And the problem about -- I mean, we'll go
9 as late as necessary. But if you all, in the exercise of your
10 judgment, conclude that in light of the events regarding the
11 sale motion, that it needs to be adjourned because of
12 continuing negotiations and that sort of thing, part of the
13 problem is, is that the following week I have a trial -- Monday
14 has got quite a full schedule, and then there's a trial
15 scheduled for the 26th, 27th and 28th, which I'm not -- I can't
16 adjourn.

17 MR. NASHELSKY: Your Honor, your chambers had made us
18 aware of the limitation, which is why we have those things on
19 the 18th. And we understand the limits in your schedule, and
20 we will try to get everything that needs to be done, done. And
21 whatever can be resolved before, we will.

22 THE COURT: Yeah. You're on the calendar for July
23 10th, and there's nothing -- no other cases are scheduled on
24 that day, so.

25 MR. NASHELSKY: Okay.

RESIDENTIAL CAPITAL, LLC, ET AL.

110

1 THE COURT: You may want to consider if there's
2 anything that needs to get moved up because of ongoing
3 developments between now and Monday. If, for example, the sale
4 hearing needs to be adjourned we ought to consider whether
5 either by moving -- there are things for the 10th, but maybe
6 they can be moved. I don't mind having hearings more often.
7 You just hit a really --

8 MR. NASHELSKY: We understand.

9 THE COURT: -- busy period, okay?

10 MR. NASHELSKY: Yeah.

11 THE COURT: Keep my chambers informed, okay?

12 MR. NASHELSKY: We will, Your Honor.

13 THE COURT: Thank you very much. We're adjourned.

14 MR. NASHELSKY: Thank you, Your Honor.

15 (Whereupon these proceedings were concluded at 12:29 PM)

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I N D E X

RULINGS

	Page	Line
Subject to UST review, debtors' final employee wage motion granted.	16	9
Subject to review by the UST, debtors motion authorizing a shared services agreement with Ally granted.	22	1
Subject to review of the order, debtors' final tax motion granted.	28	12
Debtors' final cash management motion granted.	45	5
Governmental Association motion granted	66	2
Non-Governmental Association motion granted	69	9
Supplemental servicing order granted on an interim basis.	96	25

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Penina Wolicki

PENINA WOLICKI

AAERT Certified Electronic Transcriber CET**D-569

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